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Supreme Court of the United States

OCTOBER TERM, 1952

No. 52

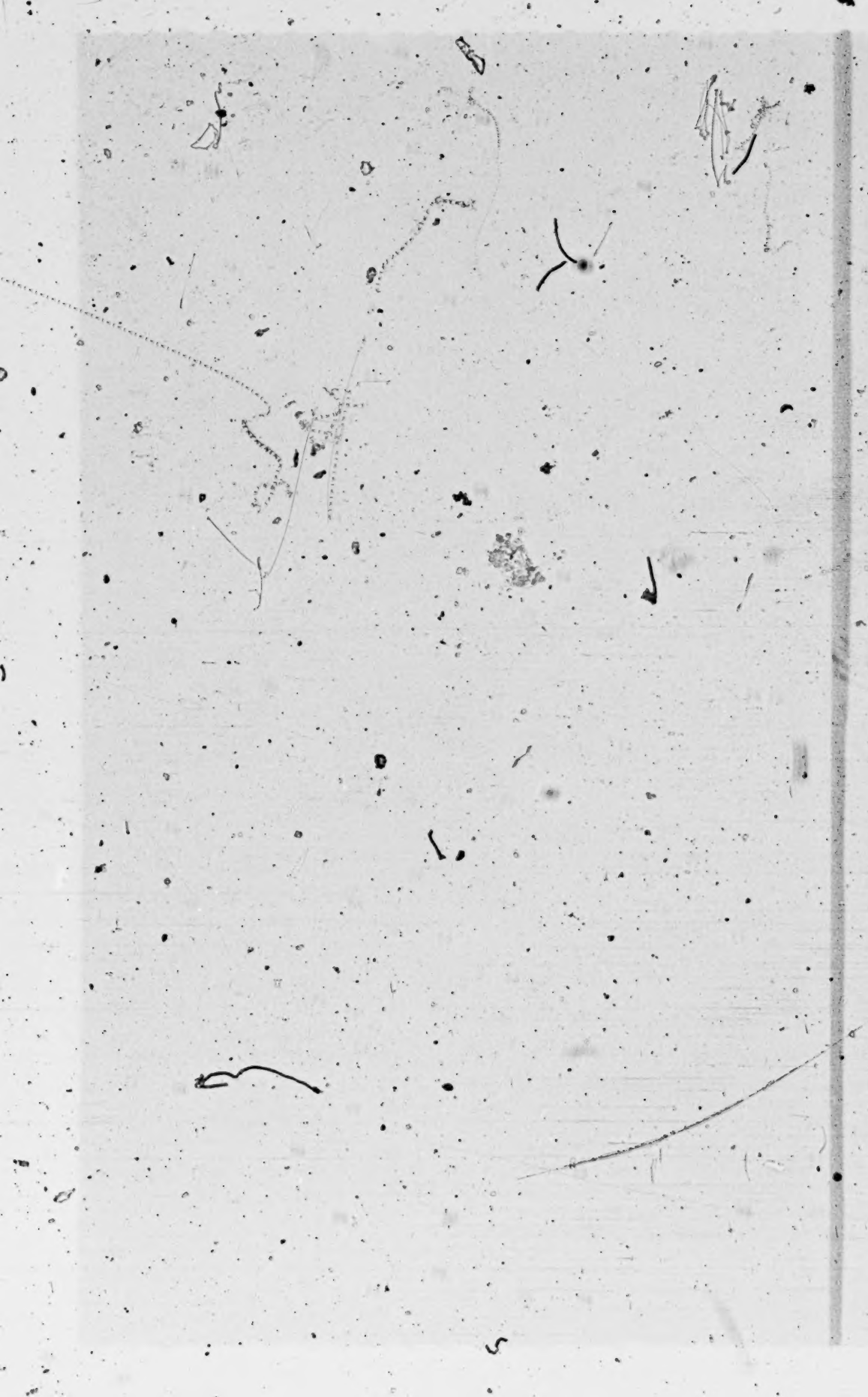
JOHN TERRY, ET AL., PETITIONERS,

vs.

A. J. ADAMS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1952
CERTIORARI GRANTED NOVEMBER 17, 1952



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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Civil Action No. 1135.

JOHN TERRY, et al.,

versus

A. J. ADAMS, et al.

DESIGNATION OF RECORD ON APPEAL—Filed, June 29, 1950

A. J. Adams et al., defendants in the above cause, who as appellants have taken an appeal to the Circuit Court of Appeals; and John Terry et al., plaintiffs in the above cause and appellees in said appeal, all acting herein by and through their respective attorneys of record, hereby jointly designate and request the inclusion in the record on appeal in the above cause the following:

1. Plaintiffs' Original Petition and Show Cause Order, filed March 16, 1950;
2. Defendants' Motion to Dismiss, filed April 24, 1950;
3. Defendants' Answer, filed April 24, 1950;
4. Stipulation between Plaintiffs and Defendants, filed April 24, 1950;
5. Qualified Stipulation between Plaintiffs and Defendants, filed April 24, 1950;
6. The Court Reporter's Transcript of the evidence and proceedings on the trial; together with the original exhibits in accordance with the Order of the Court directing their transmission to the Circuit Court of Appeals;

[fol. 2] 7. Opinion of the Court, filed May 1, 1950;

8. May 1, 1950, Calendar Sheet Notation for Judgment;
9. May 6, 1950, Final Judgment;
10. Defendants' Motion for Rehearing, filed May 16, 1950;
11. May 31, 1950, Motion Calendar Notation Denying Defendants' Motion for Rehearing;
12. Defendants' Notice of Appeal, filed May 31, 1950;
13. June 3, 1950, Order Denying and Overruling Defendants' Motion for Rehearing;

14. Order Directing Transmission to United States Circuit Court of Appeals of original exhibits and that same need not be reproduced in the record;

15. Order extending time for filing transcript of record on appeal;

16. This Joint designation of the record on appeal.

It is stipulated that each defendant was duly served with process; that notices were duly given by the Clerk on all proceedings of which the Clerk is required to give notice; that copies were duly served and notices duly given on and by each party where such was required; and that appeal bond was duly filed by appellants on May 31, 1950. [fol. 3] This Designation and Stipulation constituting the complete record and all the proceedings and evidence in the action, it is further stipulated that a Designation by appellants of a statement of the points on which they intend to rely on the appeal is not required nor necessary.

Townes & Townes, C. I. McFarlane, George Roane, Edgar E. Townes, Jr., Attorneys for A. J. Adams et al., Defendants and Appellants. Allen, Smith, Neal & Lehmann, By J. Edwin Smith, Attorneys for John Terry et al., Plaintiffs and Appellees.

[fol. 4] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' ORIGINAL PETITION AND SHOW CAUSE ORDER—Filed, March 16, 1950

Comes now John Terry, Jessie Byers, R. E. Pink, Jr., Charlie Roberts, and Price Jackson, Jr., hereinafter styled plaintiffs, complaining of A. J. Adams, George Lane, Mrs. Mattye Schultz, and R. M. Darst, all of whom are sued individually and as representatives of the governing body of the Jaybird Party, hereinafter styled defendants, and for cause of action respectfully show the Court the following:

I

Plaintiffs are each resident citizens of Ft. Bend County, Texas. Defendants are each resident citizens of Ft. Bend County, Texas, where service may be had in this cause.

This action is brought under the provisions of 8 U. S. C. A., Sec. 31, 8 U. S. C. A., Sec. 43, and 8 U. S. C. A., Sec. 47, for a declaratory judgment, for injunction, and for damages.

Plaintiffs bring the action on behalf of themselves and all others like situated. The persons in the class of the plaintiffs are so numerous as to make it impracticable to [fol. 5] bring them all before the Court. The character of the right sought to be enforced is the right of the plaintiff, and others like situated, to vote in primaries of a political party. The representation of the class by the plaintiffs will fairly insure the adequate representation of all.

Defendants are sued individually and as representatives of a class, such class being the governing body and officials of the Jaybird Party. The class is so numerous as to make it impracticable to bring all before the court; those named as parties are sufficient to fairly insure the adequate representation of all of the class.

II

Plaintiffs are each qualified voters by law of the State of Texas, of Ft. Bend County, Texas, and of each and all of the political, electoral or territorial subdivisions in which they reside within the limits of Ft. Bend County, Texas. They are members of the Negro Race.

III

Defendants are each officers of a political party existing in Ft. Bend County, Texas; this political party is commonly known as the Jaybird Party. It is a political party without a state organization that nominates for county and precinct offices only.

IV

For many years the party officials of the Jaybird Party have denied the plaintiffs, and others like situated, the right and privilege of voting in the primaries of the party because of the sole distinction of race or color. The official [fol. 6] governing body of the party on or about February 27, 1950, took official action and announced its decision that members of the Negro Race would not be allowed to vote in

the forthcoming primaries of the party scheduled for May 6, 1950 and June 3, 1950, because of the sole distinction of race or color. This is all in violation of the Constitution for the United States of America, Amendment XIV, Section 1 and Amendment XV, Section 1, and of the provisions of the Elective Franchise Statute, 8 U. S. C. A., Section 31.

V

The alleged policy and decision of the defendants has subjected, subjects, and will subject the plaintiff, and others like situated, under color of regulation, custom, and usage, to the deprivation of the rights and privileges of the elective franchise, as secured to them by the Constitution and laws, all in violation of the provisions of the Civil Rights Statute, 8 U. S. C. A., Sec. 43.

VI

The defendants have conspired, and are conspiring for the purpose of depriving the plaintiffs, and others like situated, either directly or indirectly, of equal privileges under the laws, of the free, unrestricted, and equal exercise of the right and privilege of the elective franchise, all in violation of the provisions of the Civil Rights Statute, 8 U. S. C. A., Section 47.

VII

In support of all the above allegations, and in connection with them, the plaintiffs show that in Ft. Bend County, Texas, and in its political and territorial subdivi- [fol. 7] sions the primaries of the Jaybird Party in fact effectively control the choice of precinct and county officials. The right to choose precinct and county officials and representatives is in fact controlled by the primaries of the Jaybird Party because the choice of candidate at the Jaybird primaries in fact determines the choice of the elected officials and representatives of the precincts and county. Further, the Texas statutes have made the primaries of political parties without a state organization and which nominate for county and precinct offices only an integral part of the procedure of choice for precinct and county officials and representatives.

VIII

In this action the plaintiffs, on behalf of themselves and on behalf of others like situated, seek a declaration of their right to vote in the primaries of the Jaybird Party. They show that the official action of the governing body of the party denying to them the right to vote in the primaries because of sole distinction of race or color creates a case of actual controversy within the jurisdiction of this Court under the provisions of the Declaratory Judgment Act, 28 U. S. C. A., Section 2201.

IX

Further, plaintiffs show that the denial to them; and of all others like situated, of the right and privilege of voting in the primaries of the Jaybird Party effectively and in fact denies to them freedom of choice in the primaries of the Democratic Party, for in Ft. Bend County, Texas the primaries of the Jaybird Party effectively and in fact determines the nominations of the primaries of the Democratic Party for precinct and county officials.

[fol. 8] The exclusion of the plaintiffs from the primaries of the Jaybird Party on the sole distinction of race or color effectively and in fact excludes them, and all others like situated, from exercising their right of choice in the primaries of the Democratic Party on the sole distinction of race or color.

If defendants are allowed to exclude the plaintiffs, and others like situated, from the primaries of the Jaybird Party on the sole distinction of race or color, the Jaybird Primaries will serve as a device or artifice that will effectively and in fact exclude their votes from their legal and proper effect in the primaries of the Democratic Party on the sole distinction of race or color.

Further in connection with all of the allegations herein contained, plaintiffs show that the practicable influence of the choice of candidates at the Jaybird primaries is so great as to profoundly affect the choice in the Democratic Primary, and in the general election; deprivation of the plaintiffs' right and privilege to vote in the primaries of the Jaybird Party operates, and will operate, to de-

prive them, and all others like situated, of their constituted right of choice.

X

Plaintiffs show that they have each been damaged in the sum of $5,000.00, for which they sue the plaintiffs, jointly and severally.

They show that they have no adequate remedy at law for the forthcoming primaries, and that unless the defendants are restrained by orders of this Court, plaintiffs, and all others like situated, will be deprived of their right of [fol. 9] franchise in such primaries to their irreparable injury and loss.

Wherefore, premises considered, plaintiffs pray that defendants be cited to appear and answer herein. That this Court issue its show cause order commanding the defendants to appear and show cause why a temporary injunction should not issue restraining defendants, and others of their class, from denying to plaintiff, and all others like situated, their right to vote in the forthcoming primaries of the Jaybird Party; that upon a final hearing of this cause such temporary injunction be made permanent, that this Court by declaratory judgment decree the rights of the parties hereto, and of the respective classes on the actual controversy herein alleged. That the plaintiffs have and recover their damages alleged against the defendants, jointly and severally, that the plaintiffs recover their costs in this behalf expended, and for such other and further relief, both general and special, legal and equitable, to which they have shown, or may show themselves justly entitled, and in duty bound will ever pray.

J. Edwin Smith, Attorney for Plaintiffs, John Terry, et al.

Of Counsel: Allen, Smith, Neal & Lehmann, 1605 Sterling Building, Phone: Preston 5168.

Duly sworn to by John Terry. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—March 15, 1950

On This, the 15th day of March, A. D., 1950, the foregoing pleading was presented to the Court for a show cause order for hearing on temporary injunction.

The Court being of the opinion that such show cause order should be made, it is Ordered, Adjudged and Decreed that defendants appear before this Court in Houston, Texas, on the 30th day of March, A. D., 1950, at 9:30 o'clock, A. M., to show cause why a temporary injunction should not issue as prayed for by the plaintiffs. Hearing to be on the Bill, Answer and Affidavits, and not orally.

The Clerk of this Court is hereby ordered and instructed to issue all proper and necessary writs to give notice to the defendants of this order.

Done at Houston, Harris County, Texas, this the 15th day of March, A. D., 1950.

T. M. Kennerly, Judge Presiding

[fol. 11] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO DISMISS—Filed, April 24, 1950

To The Honorable Judge of Said Court:

Come now A. J. Adams, George Lane, Mrs. Mottye Schulze and R. M. Darst, being the persons who in plaintiffs' petition "are sued individually and as representatives of the governing body of the 'Jaybird Party' ", and move the Court to dismiss this action for the following reasons:

I

The above named four defendants:

(a) Are not representatives of the governing body of the "Jaybird Party";

(b) Have no connection of any kind with the "Jaybird Party" nor the governing body, if any, thereof;

(c) Do not know of the existence of any "Jaybird Party" nor of any governing body thereof;

(d) Have never had, do not have and do not expect to have any connection with any primary election of any "Jaybird Party";

(e) Are not officers of a political party existing in Fort Bend County, Texas "which is a political party without a state organization that nominates for county and precinct offices only".

[fol. 12] Wherefore these defendants are improperly sued herein "as representatives of the governing body of the Jaybird Party", and the service of citation, if any, upon these defendants as such representatives is ineffective to bring before this Court the "Jaybird Party" if any such party exists, or the governing body thereof if there be one. These defendants are not authorized or empowered to appear or answer herein as the "Jaybird Party" or representatives thereof as they have no connection therewith nor know of the existence thereof, and "Jaybird Party", if any exists, is not before this Honorable Court by virtue of any process served upon these defendants.

II

In connection with the foregoing these individual defendants, A. J. Adams, George Lane, Mrs. Mattye Schulze and R. M. Darst, would show to the Court that A. J. Adams is President and Mrs. Mattye Schulze is Secretary of a private unincorporated organization, to-wit, the "Jaybird Democratic Association of Fort Bend County, Texas", and that the four individuals, together with other persons, are on the Executive Committee of said Association; that said Association is a private organization, being a group of individuals resident in Fort Bend County, Texas; that the "Jaybird Democratic Association of Fort Bend County, Texas" is not a corporation, and does not constitute a legal entity subject to suit as such. Said Association was organized in October 1889 prior to the passage of any statute in the State of Texas relating to, or in anywise attempting to regulate, primary elections of any political party or other organization; that said Association is not a political party; was not created nor organized as such and has not become a political party by any action of the

[fol. 13] Association nor as a result of the subsequent passage of any law or operation by the Association under any law of the State of Texas.

In or about 1905 the Legislature of the State of Texas did pass an act with reference to political parties and primary elections thereof; that one section of said act has since become and is now known as Article 3163 of the Revised Civil Statutes of Texas, and has particularly reference to a "political party without a state organization desiring to nominate candidates for county and precinct offices only * * *", and said article specifies the procedure which must be taken by any such political party "in the conduct of its nominations of candidates, and the certification of its nominations to the County Clerk" so that same in the general election "shall be printed on the official ballot in a separate column headed by the name of the party;" said Article 3163 is the only law of the State of Texas specifically applicable to a political party of the class therein designated.

These individual defendants will show that the "Jaybird Democratic Association of Fort Bend County, Texas" has never accepted any grants of power from the State; has never surrendered the powers inherent in it as a private organization and has never caused to be passed any law in anywise affecting or abridging the rights and powers inherent in the association nor granting it any rights or powers. Said Association has never abandoned any of the powers or rights of a private organization nor has it ever chosen to be or become, nor has it ever become, an agency of the State of Texas nor in anywise connected with the electoral machinery of the State of Texas, nor has said Association nor any of its activities ever been, nor is it now, an integral part of the election ma-
[fol. 14] chinery of the State for precinct, county, district, State or national elections.

Under the laws of the State of Texas (Article 3100 of the Revised Civil Statutes) a "primary election" is "an election held by the members of an organized political party for the purpose of nominating the candidates of such party, to be voted for at a general or special election, or to nominate the county executive officers of a party."

Under the laws of the State of Texas (Article 3100): "The fourth Saturday in July * * * shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except when specially authorized. * * *"

The "Jaybird Democratic Association of Fort Bend County, Texas"

(a) Has not held and does not hold any "primary election" on the 4th Saturday in July as provided by said Articles 3100 and 3102, which are referred to in said Article 3163;

(b) Has not and does not certify to the County Clerk nominations made by such Association to be printed on the "official ballot in a separate column headed by the name of such party";

(c) Has not and does not cause the name of the Association, whether a party or not, to be printed on any official ballot;

[fol. 15] (d) Has not and does not in any way follow any of the provisions of said Article 3163 or other primary election statute or general election statute of the State of Texas;

(e) Does not operate "under color of any statute, ordinance, regulation, custom or usage of any State or Territory"; does not hold or conduct "any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality or other territorial subdivision."

(f) Does from time to time determine the person or persons who in the opinion of the membership of said Association are honest substantial individuals, properly qualified, and who could honestly and efficiently perform the duties of various offices in Fort Bend County, Texas, and its various precincts, to give said county and all its citizens good, honest and sound government; and

(g) Does request such persons to apply for a position on the ballot in the July primary of the Democratic Party, with which request the individual may or may not comply, at his own choice; but

(h) Does not have anything to do with whether other individuals who might be qualified office holders under

the statutes apply or do not apply for positions on the ballot for the July Democratic Party primary, nor for any other party which holds primary elections.

III

In accordance with its practice and its effort to determine the opinion of its members as to what individuals would promote honest, efficient, sound, good government, [fol. 16] the "Jaybird Democratic Association of Fort Bend County, Texas" will on May 6, 1950, give its members opportunity to express their respective preferences as to what individuals should be given endorsement and support of the members of the Association in the event those individuals later apply for positions on the ballot for the Democratic primary election on the 4th Saturday in July, 1950. Plaintiffs have the full right and authority to likewise at any time and in any manner determine what persons plaintiffs and their friends and other members of their own organization will endorse or support in said July Democratic Party primary, all without let or hindrance by the "Jaybird Democratic Association" or of these defendants; save and except only that plaintiffs are not members of the private organization of which defendants are members and will not be permitted by said Association to participate in any activity of the "Jaybird Democratic Association of Fort Bend County, Texas" of which said plaintiffs are not members, and which has its own rules and regulations governing its membership and participation in its activity.

Wherefore, these defendants respectfully show that the "election" or "primary" mentioned in plaintiffs' complaint, is a matter of purely private organizational concern; does not constitute any "election by the people"; does not constitute elections or primaries under any state or other law; is not "under color of any Constitution, law, statute, custom, usage or regulation of any State or Territory"; that by the very dates, to-wit, May 6 and June 3, 1950 set forth in plaintiffs' complaint, same is affirmatively shown to be outside of, without regard to and entirely unconnected with any statutory or official primary election, and does not constitute any part of the election machinery of

the State of Texas, but is wholly unconnected therewith [fol. 17] and independent thereof and is a mere expression of preference by the membership of said Association as to individuals said membership will endorse and support in a subsequent official primary election should said individuals apply for a position on the ballot thereat as plaintiffs and their friends are likewise authorized to do.

Wherefore, these individual defendants will respectfully show the Court that this cause is not one of which this Honorable Court has jurisdiction, and therefore these individual defendants respectfully pray:

(a) That this cause be dismissed as to the "Jaybird Party", which is not before this Honorable Court, and

(b) That this cause be dismissed in all things as not being within the jurisdiction of this Court and as not involving any matter of which this Honorable Court is given jurisdiction under the Constitution of the United States and the Amendments thereto, and as not involving any matter within the purview of the statutes of the United States concerning elective franchise or civil rights as set forth in 8 U. S. C. A., Sections 31, 43 and 47, or under the Declaratory Judgment Act, 28 U. S. C. A., as alleged by plaintiffs, or any other act or provision of the laws or statutes of United States.

Respectfully submitted, Townes & Townes, by E. E. [fol. 18] Townes, Edgar E. Townes, Jr., 1312 Esperson Bldg., Houston 2, Texas. D. R. Pearson, Attorneys for Defendants, Richmond, Texas. C. I. McFarlane, G. G. Roane.

Duly sworn to by R. M. Darst and A. J. Adams. Jurat omitted in printing.

[fol. 19] In United States District Court

Defendant's Answer—Filed, April 24, 1950

To The Honorable Judge of Said Court:

Subject to their "Motion to Dismiss" filed herein, and only in the event same be overruled, come now A. J. Adams, George Lane, Mrs. Mattye Schulze and R. M.

Darst, defendants in the above cause, and file this their original Answer herein, and will respectfully show:

I

These defendants specially deny that they are representatives of the governing body of the "Jaybird Party."

II

Said defendants admit that they are residents of Fort Bend County, Texas and have been individually served with process herein; understand that plaintiffs are residents of Fort Bend County but demand strict proof there of.

III

Defendants deny that this action is brought to enforce a right of plaintiffs and others to vote in primaries of a political party.

IV

Defendants are without sufficient information to enable them to state whether plaintiffs are qualified voters by the [fol. 20] laws of Texas, and its subdivisions, and demand strict proof thereof.

V

Defendants deny that they are officers of a political party, and deny any knowledge of the existence of the "Jaybird Party", and deny that they are connected with or know of a political party in Fort Bend County, Texas, without a state organization that nominates for county and precinct offices only.

VI

Defendants are without information as to any act of "the party officials of the Jaybird Party" or whether such officials, if they exist, have denied plaintiffs the right to vote in any primary. In this connection these individual defendants state that the rules and regulations of a private organization to which defendants belong, to-wit, the "Jaybird Democratic Association of Fort Bend County, Texas", which does not come within any statutory classification and is not a political party, do preclude members of the

Negro race from participating in any activity of said Association; members of the Negro race not being members of said Association.

VII

These defendants deny that they have made any decision, and that any organization with which they are connected has made any decision, which will subject plaintiffs or any other person to the deprivation of any rights or privileges of the elective franchise secured to them by the Constitution and laws of the United States.

[fol. 21]

VIII

These defendants deny that they have conspired or are conspiring for the purpose of depriving plaintiffs or any other person of equal privileges under the laws of the free, unrestricted and equal exercise of the right and privilege of the elective franchise.

IX

These defendants specially deny each allegation of Paragraphs Nos. V, VI, VII, IX and X of plaintiffs' complaint herein.

X

Defendants admit that according to the allegations of the complaint plaintiffs seek a declaration of their right to vote in the primaries of the "Jaybird Party"; but deny any knowledge of the existence of a "Jaybird Party" or of any statutory primaries thereof; and therefore deny any knowledge as to whether any action of the governing body of such party, if it exists, denies plaintiffs the right to vote in such primaries, if any are held, because of sole distinction of race or color, and creates a case of actual controversy within the jurisdiction of this Court under the Declaratory Judgment Act.

XI

These defendants intend in good faith to contravert all of the averments of plaintiffs' original Petition filed herein, save and except only as expressly admitted in this Answer.

[fol. 22] XII

The Jaybird Democratic Association of Fort Bend County, Texas, of which these defendants are members, was organized in 1889 for the purpose of attempting to secure economical and honest county government by honest competent officials, and to attempt to rectify conditions which had developed during the so-called Reconstruction Period, particularly in localities such as Fort Bend County where the Negroes greatly outnumbered the whites. In the registration of voters from May to September 1867 there were admitted to registry 153 white voters and 1334 colored voters in the county. The State was placed under military rule; county officials were appointed and removed at will under military authority. When military control was discontinued, county and precinct offices were held over by the group theretofore in control, most of the white members of which had come into the county after the War. The colored people, only recently freed, were controlled by the white newcomers.

The result was a county government of dishonesty, corruption, graft and also of arrogance toward the native white citizens. The county officials were not interested in orderly honest government, the enforcement of law, the prevention of crime or its adequate punishment. The native white people tried through a course, by personal persuasion and by appeal, both to the white members of the ruling organization and also to the Negroes to bring about some betterment of official conditions and conduct, but to no avail.

Most, if not all, of the white people excluded from participation in voting or political affairs were Democrats. As time passed on and a greater percentage of the [fol. 23] Democrats began to be permitted to vote, different groups among them sought to organize and support candidates for office, but without success.

Finally the condition became so intolerable that the Democrats, joined perhaps by a few good Republican citizens, decided to organize an association of white citizens to be known as the "Jaybird Democratic Association of Fort Bend County", stating their object thus: "The object of this association shall be to secure to the people of

Fort Bend County economic and honest county government and the election of honest and faithful county officials". "Every bona fide white citizen of Fort Bend County shall be eligible to membership in this association." This was in 1889.

Throughout the years the membership of the association has, by some method, ascertained whom the majority of its members desired to support for various county and precinct offices. For a period, it determined the preference of its members at mass meetings of the membership, before which mass meetings were placed the names of those who desired to seek office or whose friends desired to present and support them. Later the method was changed to a ballot voting system paralleling in general form and method the system set up by state law for political party government.

Those candidates selected as preferred by the membership of the Association by whatever method was followed were advised of their selection. The news of the result of voting in the Association was spread by word of mouth, newspaper and any other available news channels.

[fol. 24] With the announcement of the selection of the candidates preferred by the membership of the Association, the organization's connection with the matter terminated.

XIII

These defendants are members of the Jaybird Democratic Association of Fort Bend County, Texas, and A. J. Adams is President and Mrs. Mattye Schulze is Secretary thereof.

Said Association is not incorporated under the laws of the State of Texas but is a private organization with its own rules and regulations concerning membership and procedure.

The policy of the Association is to limit its membership to white persons, as reflected by the Constitution and resolutions of the Association.

Under the policy of the Jaybird Democratic Association of Fort Bend County, Texas no members of the Negro race are members of the Association. No member of the Negro race has ever applied for membership or requested

to vote in the Association prior to January 1950, after which time persons representing themselves as representatives of the National Association for the Advancement of Colored People and of Texas Club of Democratic Voters demanded that members of the Negro race be not excluded but allowed to vote in the May 1950 or other "primaries" of the Jaybird Democratic Association of Fort Bend County, Texas; and certain of the plaintiffs and others petitioned that they be allowed to vote "in the primary election of May 1950".

[fol. 25] XIV

The Jaybird Democratic Association of Fort Bend County, Texas was organized in 1889 prior to the passage of any statute in the State of Texas relating to or in anywise attempting to regulate primary elections of any political party or other organization. The Association is not a political party; was not created nor organized as such and has not become a political party by any action of the Association nor as a result of the subsequent passage of any law or operation by the Association under any law of the State of Texas.

The Association has never followed nor undertaken to comply with any provisions of the statutes of the State of Texas; does not operate under color of any statute, ordinance, regulation, custom or usage of any State or Territory, and does not hold or conduct any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality or other territorial subdivision.

The Jaybird Democratic Association of Fort Bend County, Texas, is an organization whose members are interested in good, honest, efficient government; and it undertakes to determine and to secure the consensus of opinion of its members as to what individuals who desire or might desire to run for election for a particular office would make qualified and proper incumbents of the offices, and therefore what individual or individuals the members of the Association should endorse and support for the respective offices in the event such individuals decide to stand for election therefor. In the matter of securing the consensus

of opinion of its members the Association takes a "straw vote", as does the National Association for the Advance-
[fol. 26] ment of Colored People, of which at least some of the plaintiffs are members, and as do numerous other organizations such as various church organizations, labor organizations, business organizations, school and innumerable other organizations, clubs and groups of people.

XV

The particular method followed by the Jaybird Democratic Association of Fort Bend County, Texas, at this time in taking its "straw vote" is to hold what it designates a "Jaybird election" early in May of each election year, and at which time ballots previously prepared by the Association's twenty-two member Executive Committee are made conveniently available to the members at designated places throughout each of the twenty-two voting precincts of Fort Bend County. These ballots are marked by the members who under the Association rules may receive no assistance therein; and are delivered to the Association Executive Committee for canvass and tabulation to determine the persons which will be endorsed by the Association.

All expenses in conducting such "Jaybird election" are paid by the Association from fees previously paid by the persons so seeking endorsement of the Association.

In the conduct of its May primary and in the conduct of its June run-off primary, if same be required, the Association designates its own officiating and assisting persons and their services are paid for wholly by the Association.

[fol. 27] XVI

After the Executive Committee of the Jaybird Democratic Association of Fort Bend County, Texas canvasses and announces the results of the May balloting of the Association members and of the June run-off, if such be held, the functions and activities of the Association and of said Executive Committee cease; and neither the Association nor the Executive Committee participates in the subsequent official statutory primary elections of the Democratic Party, the Republican Party or of any other political party or organization.

XVI

Under the laws of the State of Texas (Article 3100, R. C. S.) a "primary election" is "an election held by the members of an organized political party for the purpose of nominating the candidates of such party, to be voted for at a general or special election, or to nominate the county Executive Officers of a party".

Under the laws of the State of Texas (Article 3102 R. C. S.) "The fourth Saturday in July * * * shall be general primary election day and primary elections to nominate candidates for a general election shall be held on no other day except when specially authorized * * *"

Article 3163, R. C. S. of Texas, is the only statute with reference to "parties without state organization" and specifies that such an organization "desiring to nominate candidates for county and precinct officers only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on a legal primary election day * * *", and contains other requirements made of such a party.

[fol. 28] The Jaybird Democratic Association of Fort Bend County, Texas is not a political party, has no state organization and does not in anywise follow or attempt to comply with the provisions of said Article 3153, and said Association:

(a) Has not held and does not hold any "primary election" or county convention on the fourth Saturday in July as provided by said Article 3100 and 3102, which are referred to in said Article 3163; and has not and does not nominate candidates to be voted for at a general or special election;

(b) Has not and does not certify to the County Clerk nominations made by such Association to be printed on the "official ballot in a separate column headed by the name of such party";

(c) Has not and does not cause the name of the Association, whether a part or not, to be printed on any official ballot;

(d) Has not and does not in any way follow any of the provisions of said Article 3163 or other primary elec-

tion statute or general election statute of the State of Texas;

(e) Does not operate "under color of any statute, ordinance, regulation, custom or usage of any State or "Territory"; does not hold or conduct "any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality or other territorial subdivision."

(f) Does from time to time determine the person or persons who in the opinion of the membership of said Association are honest substantial, individuals, properly qualified, and who could honestly and efficiently perform the duties of various offices in Fort Bend County, Texas, [fol. 29] and its various precincts, to give said county and all its citizens good, honest and sound government; and

(g) Does request such persons to apply for a position on the ballot in the July primary of the Democratic Party, with which request the individual may or may not comply, at his own choice; but

(h) Does not have anything to do with whether other individuals who might be qualified office holders under the statutes apply or do not apply for positions on the ballot for the July Democratic Party primary, nor for any other party which holds primary elections.

These defendants will show that the "Jaybird Democratic Association of Fort Bend County, Texas" has never accepted any grants of power from the State; has never surrendered the powers inherent in it as a private organization and has never caused to be passed any law in anywise affecting or abridging the rights and powers inherent in the Association nor granting it any rights or powers. Said Association has never abandoned any of the powers or rights of a private organization, nor has it ever chosen to be or become, nor has it ever become, an agency of the State of Texas nor in anywise connected with the electoral machinery of the State of Texas, nor has said Association nor any of its activities ever been, nor is it now, an integral part of the election machinery of the State for precinct, county, district, State or national elections.

Said Association performs no function of the State nor of any agency of the State of Texas, nor does it have any

connection with the Democratic Party or any other politi-
[fol. 30] cal party. The May and June Jaybird Democratic Association primaries are not held on any official statutor or general primary election day nor under the auspices of any political party required by the law to hold a primary or general election, nor under the auspices, nor at the expense of the State of Texas, or of any political subdivision thereof.

XVII

The persons who receive the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, at its May and June primaries are not obliged to apply for a place on the ballot for the Democratic Party primary or any other party primary on the official statutory general primary election day on the fourth Saturday in July; but said persons may or may not so apply at their own choice.

No person who is eligible under the law to hold office, and who does not apply for a position on the ballot for the July primary, as provided by law, is placed on the ballot of said July Democratic Party primary. Similarly, no person who is qualified to hold office and who files for a place on the July Democratic Party primary ballot and pays the required fee therefor is refused a place on the ballot.

Neither the matter of membership in the Jaybird Democratic Association, nor the matter of expressing preference at the May or June primaries of the Jaybird Democratic Association of Fort Bend County, Texas, affects one way or the other the right of any person, including plaintiffs in this cause, of applying for and securing a place on the July Democratic primary ballot, or from voting at said official general primary election in the month of July.

[fol. 31] XVIII

Neither the May nor June balloting by members of the Jaybird Democratic Association of Fort Bend County, Texas, nor any procedure by the Association or its Executive Committee, has any effect whatsoever upon, nor does it constitute, an "election by the people"; nor does it affect

nor constitute elections or primaries under any state or other law; nor is it "under color of any Constitution, law, statute, custom, usage or regulation of any State or Territory"; that by the very dates, to-wit, May 6 and June 3, 1950 set forth in plaintiffs' complaint, same is affirmatively shown to be outside of, without regard to and entirely unconnected with any statutory or official primary election, and does not constitute any part of the election machinery of the State of Texas, but is wholly unconnected therewith and independent thereof and is a mere expression of preference by the membership of said Association as to individuals said membership will indorse and support in a subsequent official primary election should said individuals apply for a position on the ballot thereat as plaintiffs and their friends are likewise authorized to do.

Wherefore, these defendants respectfully pray that this Honorable Court enter its order herein that it has no jurisdiction of any matters here involved, and that plaintiffs' action be in all things dismissed at cost of plaintiffs.

In the alternative, defendants respectfully pray that upon final trial and hearing hereof plaintiffs take nothing by their suit; that plaintiffs' prayer for injunction be refused and overruled, and that judgment be herein en-[fol. 32] tered decreeing that neither plaintiffs nor any member of the class allegedly represented by them have any right to vote in the May 6 or June 3, 1950 balloting of the Jaybird Democratic Association of Fort Bend County, Texas; and that said judgment further provide, and affirmatively find and declare that said Association is not a political party subject to any regulation or control of the State or of the United States government; and that the balloting by the members of said Association does not constitute a primary election or other election within the contemplation of law.

Respectfully submitted, Townes & Townes, E. E. Townes, Edgar E. Townes, Jr., 1312 Esperson Bldg., Houston 2, Texas. D. R. Pearson, Richmond, Texas. Clarence I. McFarlane, Attorneys for Defendants, Commerce Bldg., Houston 2, Texas. Geo. G. Roane, 2208 Ave. H, Rosenberg, Texas.

[fol. 33] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed April 24, 1950.

For the purpose of expediting any and each hearing, trial and other proceedings in the above styled and numbered cause, and of minimizing cost and expense to all parties, the Plaintiffs, John Terry, Jessie Byers, R. E. Pink, Jr., Charlie Roberts and Price Jackson, Jr., and the Defendants, A. J. Adams, George Lang, Mrs. Mattye Schulze and R. M. Darst, each acting herein by and through their respective attorneys of record, make the following stipulations:

I

It is agreed that the facts hereinafter stated are true and correct and may be taken and treated in any and each proceeding in this cause and in any appeal or appeals therein the same as though each of such matters had been, without contradiction or controversy, proven by witnesses personally on the witness stand, or by documents introduced in evidence.

Either party may on the trial of this cause offer in evidence any other fact, testimony and documents not inconsistent with the matters herein stipulated.

II-A

Throughout this stipulation the word "indorsement" is frequently used particularly with reference to the action of the Jaybird Democratic Association of Fort Bend County, Texas, its executive committee and the voting [fol. 34] of the members thereof. Plaintiffs do not agree that such action by the Association, its executive committee or the voting of its members constitutes merely "an indorsement", but reserve the right to contend that the Association's action constitutes a "nomination" within the meaning of the primary election laws of Texas.

II-B

By the phrase "official primary" as used in this stipulation, is meant the Democratic Party primary elections held

the fourth Saturday in July and the fourth Saturday in August, as provided in Article 3102 Texas R. C. S.

The Jaybird Democratic Association primaries are held in May and June, and are now scheduled for May 6, and June 3, 1950.

Plaintiffs reserve the right to contend that the Jaybird Democratic Association primaries are "Primary Elections" within the meaning of the primary election laws of Texas.

III

There is no political organization in Fort Bend County, Texas, by the official name or designation "Jaybird Party". At all times since 1889, however, there has been and still is, an organization in Fort Bend County, Texas, by the name of "Jaybird Democratic Association of Fort Bend County, Texas". Said Association, however, has not [fol. 35] since 1938, and it does not: (a) Have a State organization; (b) Follow or attempt to comply with any of the provisions of Article 3163 of the Revised Statutes of Texas, or of any other statutes of the State of Texas with reference to primary elections or general elections; (c) Hold any convention or "primary election" on the legal primary election day, to-wit: The fourth Saturday in July or the fourth Saturday in August, of any year; (d) Hold any primary convention in any precinct on the Saturday preceding a legal primary election day; (e) By the chairman of a county committee, or otherwise, certify to the County Clerk of Fort Bend County, Texas, or to the County Judge thereof, or to any official committee or other representative of the Democratic or Republican party, any nominations or indorsements made by the Association; (f) Have, or cause to be, printed in a separate column headed by the Association name any nominations on any official ballot used, or for use in, a primary or general election held on a legal primary election day or general election day; (nor does the name, Jaybird Democratic Association of Fort Bend County, Texas, or any part or indication thereof, appear on any ballot in any election other than the primaries, or other special voting occasions, held by the Association itself and alone); (g) Make, or cause to be made, a written applica-

tion to the County Judge for such printing, signed and sworn to by 3% of the entire vote cast in Fort Bend County at the last preceding general election.

IV

The Jaybird Democratic Association of Fort Bend County, Texas, has an Executive Committee. To provide representation thereon to all portions of Fort Bend County, [fol. 36] the Committee is composed of 22 persons, each selected by the members of the Association resident in the 22 respective voting precincts of the Association.

Defendant A. J. Adams is President, George Lane is Vice President and Mrs. Mattye Schulze is Secretary of the Association and said defendants, together with defendant R. M. Darst, are each members of the Executive Committee.

V

Early in each year in which elections are to be held the Executive Committee of the Jaybird Democratic Association meets and sets the dates (a) by which persons who desire their names on the Jaybird Democratic Association primary ballot must file applications therefor; (b) the date by which the fees to be paid by each such person toward the expense of the Jaybird Democratic Association primary shall be paid; (c) the date on which the Jaybird Democratic Association primary shall be held in May; and (d) the date on which the Jaybird Democratic Association run-off primary, if required, will be held in June.

The Jaybird Democratic Association Executive Committee fixes the fees to be paid by each such applicant for the purpose of deferring the expenses of the Jaybird Democratic Association primaries and such fees are usually fixed at between 2% and 3% of the annual salary paid for the offices to which the applicants aspire. The Executive Committee also selects the persons who conduct the Jaybird Democratic Association primaries and fixes the fees to be paid them.

[fol. 37] The costs and expenses of holding the Jaybird Democratic Association primaries are wholly paid by the Association from the fees so collected from the applicants.

VI

The Executive Committee of the Association receives all applications from persons who desire their names placed on the ballot for the Jaybird Democratic Association first primary; determine the eligibility of the applicants; and makes up the ballot, which shows separately each county-wide office and each precinct office for which applications have been made. The ballots are printed and are made up differently for each County Commissioner precinct, each Justice of the Peace precinct and each Constable precinct for which applications have been received and approved, so that the Association members express their preference for persons who have applied for indorsement for county-wide positions and persons who have applied for indorsement for positions in the precinct wherein the voting member resides.

VII

A rule of the Jaybird Democratic Association of Fort Bend County, Texas, prohibits the indorsement by the Association of a member for any office which said member has held for two terms, and the Executive Committee rejects the application of any member for a position on the Jaybird Democratic Association primary ballot if such applicant has held the office, for which indorsement is re- [fol. 38] quested, for two terms. After the lapse of two years from the time a member last held a particular office such member is again eligible for the indorsement of the Association for that office. Positions on the Jaybird Democratic Association primary ballot are refused to members who have held an elective office for two successive terms.

VIII

The Jaybird Democratic Association primary is held early in the month of May of each election year, and is scheduled for May 6, 1950. In the event an applicant for indorsement for a particular office does not, in the May Jaybird Democratic Association primary, receive a clear majority of all votes cast for all applicants for such position, then the Association holds a run-off primary early in

June of each such election year; and such Association run-off, if one is required, is scheduled to be held June 3, 1950.

IX

For the purpose of voting by members of the Jaybird Democratic Association at the May and June Association primaries, ballot boxes are provided in 23 voting precincts scattered throughout the country; these Association voting precincts comprise the same respective areas as the voting precincts in official Democratic Party primaries and official general elections.

X

As above indicated, printed ballots are used in the Jaybird Democratic Association primaries, and same are [fol. 39] marked by the individual voter expressing his preference as to what person or persons for each position shown thereon should have the indorsement of the Association. Under the rules of the Association no one may receive any assistance in voting.

The membership of the Jaybird Democratic Association of Fort Bend County, Texas, is limited to white males and females, who indorse the principles of the Association and who are eligible to vote in official elections held in the State of Texas; provided that white persons who indorse the principles of the Association and who have moved into the county six months prior to the Association primary, and who are also eligible to vote in official elections held in the State of Texas, may also vote thereat to indicate their preference as to what persons should be indorsed by the Association.

The policy of the Jaybird Democratic Association of Fort Bend County, Texas, as expressed in resolutions heretofore passed at meetings of the membership of the Association, is that only white persons are entitled to vote in the Association primaries; and it is the intention of the Association that in the Association primaries scheduled for May 6 and June 3, 1950, only white persons may be permitted to vote.

Plaintiffs in this cause are members of the Negro race, are therefore not admitted to membership in the Jaybird

Democratic Association under its rules of membership, and under the present policy of the Association, as reflected in its resolutions heretofore adopted by the membership, the individual plaintiffs in this cause would be denied a [fol. 40] ballot and a vote if plaintiffs should present themselves individually at one of the Association precinct voting places at the May 6 or June 3, 1950, Jaybird Democratic Association primary, due to the fact that plaintiffs are not members of the white race, and to permit them to vote would be contrary to the present policy, rules and regulations of the Jaybird Democratic Association of Fort Bend County, Texas.

XI

The Ballots from each of the Association voting precincts are canvassed by the Executive Committee to determine which person seeking the indorsement of the Association for each position has received the greatest number of votes. The Executive Committee of the Association declare the results of such canvass of the returns and announce the identity of the respective persons who have so received the greatest number of votes at the May Jaybird Democratic Association of Fort Bend County, Texas, for the respective positions.

No officer nor Committee of such Association certifies the result of the Association membership vote, nor any nominations of the Association, to the County Clerk of Fort Bend County, Texas, nor to the Democratic Party Executive Committee nor to the Committee or official of any party with a state-wide organization.

[fol. 41]

XII

There is no compulsion upon any person who receives the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, for a particular office, to run for that office or any other office. In the event such indorsee of the Association does desire to run for such office he may do so; but if he does so run for such office he must himself file his application with the Executive Chairman or Committee of the Democratic Party for the position on the Democratic Party ballot for the July primary of such Democratic Party, and must himself pay the

fee as provided by law. Neither the Jaybird Democratic Association nor its Executive Committee files an application with the Democratic Party Executive Committee or Chairman that the Jaybird Democratic Association nominee be placed on the ballot for the Democratic Party July primary election. There is nothing on the ballot of the Democratic Party primary to indicate that any person appearing thereon does or does not have the indorsement of the Jaybird Democratic Association.

The name of the applicant for a place on the Democratic Party ballot is not placed on said ballot unless he complies with the laws of the State of Texas, even though such applicant were indorsed by the Jaybird Democratic Association; and every qualified applicant who makes the required application to the Democratic Executive Committee and pays the requisite fee is placed on the Democratic Party primary ballot for the July Democratic primary though not indorsed by the Jaybird Democratic Association.

[fol. 42] No member of the Negro race, nor any other person qualified under the laws of the State of Texas to become a candidate, has been refused a place on the Democratic Party primary ballot for Fort Bend County, Texas, by the Democratic Party.

Prior to January 1950, no member of the Negro race has ever applied for membership in the Jaybird Democratic Association or offered to vote in the May primary of the Association.

In the last few years some of the members of the Negro race have offered to vote in the Democratic Party primaries and no member of the Negro race who had qualified under the laws of the State of Texas to vote has been refused the right to vote. Some of the members of the Negro race have offered to vote in a general election in Fort Bend County, Texas, and no member of the Negro race qualified to vote has been refused a vote.

XIII

Membership in the Democratic Party or any other political party does not disqualify a person from membership in the Jaybird Democratic Association of Fort Bend County, Texas; nor does membership in said Association

disqualify a person from membership in any political party.

XIV

The Jaybird Democratic Association of Fort Bend County, Texas, is not, and does not have, a state organi- [fol. 43] zation, but limits its May and June Association primaries to only the county and precinct offices, except that the membership of the Association does vote its preference for the office of District Clerk in Fort Bend County.

The persons seeking the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, at its May or June Primaries are not required by the Association to file any expense account and do not file expense accounts with any State or local official, Committee or Board.

XV

Since 1938 the persons winning the indorsement of the Jaybird Democratic Association of Fort Bend County, at its primaries, for county-wide offices, have applied for the respective positions on the ballot for the July Democratic Party primary, and have been indorsed thereat, and have been elected to the respective county-wide offices at the general election.

Since 1938, in most instances there has been only one name on the Democratic Party July primary ballot for each countywide or precinct office, such name being that of the person winning the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, in its primary. There have been some exceptions, the extent of which the parties hereto shall have the right to show.

There are some instances in which the persons indorsed by the Association for precinct offices have been defeated in Democratic primary. The parties hereto reserve the [fol. 44] right to show the extent of such instances.

There are some instances in which persons, whose applications for indorsement by the Jaybird Democratic Association have been rejected, have been nominated at the Democratic Party primary and elected in the general election, to precinct offices.

No person qualified to hold office who has applied for a

position on the Democratic Party July primary ballot, and has paid the fee, as provided by law, has ever been refused a position on the Democratic primary ballot.

XVII

Fort Bend County, Texas, is divided into the four (4) statutory Commissioners' Precincts. Said county is also divided into eight (8) Justice of the Peace Precincts and therefore eight (8) coincident Constable Precincts.

The parties to this cause do not deem it necessary to cover in this stipulation matters prior to 1938 with reference to the County and Precinct matters of the Jaybird Democratic Association of Fort Bend County, Texas, nor of the Democratic Party or other political party.

In the May Jaybird Democratic Association primary in each of the years 1940, 1942, 1944 and 1948, the members of said Association voted for their preference for indorsement [fol. 45] by the Association for Commissioners of each of the four (4) Commissioners' Precincts; but in 1938 and 1946 no one applied for indorsement of the Jaybird Democratic Association nor for a place on the May Association ballot for Commissioners' Precinct No. 3.

In each of the years 1938, 1940, 1942, 1944, 1946 and 1948, the only Justice of the Peace Precincts with reference to which any person applied for the Jaybird Democratic Association indorsement or for a position on the Association's May primary ballot were Justice of the Peace Precincts Nos. 1, 2 and 3.

Individuals applied for the Jaybird Democratic Association indorsement and for positions on the Association's May primary ballot for the following Constable Precinct positions in each of the years indicated:

1938 Constable Precincts 1, 2 and 3
1940 Constable Precincts 1, 2, 3 and 6
1942 Constable Precincts 1, 3 and 8
1944 Constable Precincts 1, 2, 3 and 7
1946 Constable Precincts 1, 2, 3 and 7
1948 Constable Precincts 1, 2, 3 and 7

The offices of both Justice of the Peace and Constable have always been entered in the Democratic Party July

primary and in the November general election for Justice and Constable Precincts Nos. 1, 2, 3 and 4, and said offices have always been occupied by incumbents.

No Justice of the Peace has been nominated or elected in the Democratic Party July primary nor in the general [fol. 46] election for the past several years in Justice Precincts Nos. 7 and 8, as there is insufficient business in said precincts to justify the office being occupied.

Constables have been nominated and elected in the Democratic Party July primary and the general election in said Constable Precincts Nos. 7 and 8 and said offices have incumbents.

For the past several years there has not been a Justice of the Peace nor a Constable in Justice and Constable Precincts Nos. 5 and 6, as there is insufficient business in said precincts to justify filling the offices.

XVIII

In 1938 the Jaybird Democratic Association rejected the application of Ed Stern for the Association indorsement for the position of Commissioner of Precinct No. 2 as Mr. Stern had occupied the office for two terms; and the Association Executive Committee denied Mr. Stern a place on the Jaybird Democratic Association May 1938 primary ballot.

Mr. Ed Stern, Mr. Fred Grunewald and Mr. C. D. Cardwell applied for and secured positions on the Democratic Party primary election of July 23, 1938 and in said election Mr. Stern received 525 votes; C. D. Cardwell received 386 votes, and Mr. Fred Grunewald received 207 votes.

In the August 27 Democratic Party run-off primary election, Mr. Ed Stern received 534 votes and Mr. D. C. Card- [fol. 47] well received 568 votes for County Commissioner of Precinct No. 2.

Mr. Cardwell was the Jaybird Democratic Association indorsee.

In the May 1940 Jaybird Democratic Association primary, Mr. Ed Stern had been given a place on the Association's ballot, and no person for County Commissioner of Precinct No. 2 having received a clear majority, the Association held a June 1940 Association run-off primary in

which Mr. Stern did not receive the majority of the vote of the Association members and was therefore not the indorsee of the Jaybird Democratic Association for the office.

XIX

In the May 1940 Jaybird Democratic Association primary, Mr. I. G. Wirtz received a majority of the Association membership vote for the position of County Commissioner of Precinct No. 3 and was the indorsee of the Association. Mr. Wirtz applied for and was given a position on the Democratic Party primary ballot for the July 27, 1940 Democratic Party primary; received the Democratic Party nomination and in the general election was elected as Commissioner of Precinct No. 3.

Similarly, Mr. I. G. Wirtz received the indorsement of the Jaybird Democratic Association at its May 1942 Association primary. Mr. Wirtz likewise secured the Democratic Party nomination at its July 25, 1942 primary election; and was thereafter elected Commissioner of Precinct No. 3 at the general election.

[fol. 48] In 1944, the Executive Committee of the Jaybird Democratic Association of Fort Bend County, Texas, rejected Mr. Wirtz' application for the Association indorsement for Commissioner of Precinct No. 3 and refused Mr. Wirtz a position on the Association ballot at its May 1944 primary. Mr. J. R. Pirtle was on the Jaybird Democratic Association May 1944 primary ballot for indorsement for Commissioner of Precinct No. 3 and received 269 votes. Mr. Wirtz received 394 "write-in" votes. The Association Executive Committee having declared Mr. I. G. Wirtz ineligible, due to the fact he had held the office of Commissioner of Precinct No. 3 for two years, rejected and disregarded the "write-in" votes and the Association indorsement for the position was given Mr. Pirtle.

Both Mr. I. G. Wirtz and Mr. J. R. Pirtle applied for and were given positions on the Democratic Party July 29, 1944 primary election ballot, and at said Democratic Party's primary election Mr. I. G. Wirtz received 450 votes and Mr. J. R. Pirtle received 5 votes; and Mr. I. G. Wirtz

in the general election was elected County Commissioner of Precinct No. 3.

Similarly, in 1946 and 1948, Mr. I. G. Wirtz was refused a position on the Jaybird Democratic Association May primary ballot for County Commissioner of Precinct No. 3; but applied for and secured a place on the July primary ballot of the Democratic Party and in each instance defeated the indorsee of the Jaybird Democratic Association for the Democratic Party nomination and was elected County Commissioner of Precinct No. 3 at the subsequent general election.

[fol. 49] XX

In 1944, four persons applied to the Executive Committee of the Jaybird Democratic Association of Fort Bend County, Texas, for indorsement of the Association and for positions on the May 6, 1944 Association ballot for indorsement for the position of County Judge. In the June 1944 Association run-off, Mr. Charles Schultz, who was second man in the May 6 Association voting by 1013 to 1104 for Mr. Meyer, secured the indorsement of the Association members by 1086 to 781.

In the July 22, 1944 Democratic Party primary election, Mr. Schultz was given 2025 votes to 1 vote for Mr. Mike Dornak.

For the July 27, 1946 Democratic Party primary election, Judge Schultz was the only person who applied for position on the ballot for the office of County Judge.

In 1948, at the May primary of the Jaybird Democratic Association Mr. H. Cecil Baker secured the indorsement of the Association for the position of County Judge by a vote of 2308 to 1695 for Mr. J. F. Ward.

Mr. Charles Schultz, having served two terms as County Judge, ran for reelection on the July 24, 1948 Democratic Party primary ballot against Mr. H. Cecil Baker, the Association indorsee, and received 803 votes in said Democratic Party primary election to 2209 votes for Mr. H. Cecil Baker.

[fol. 50]

XXI

In 1942, Mr. L. J. Sanders was indorsed in the May Jaybird Democratic Association primary for the position of Constable of Precinct No. 8; but did not apply for and was not given a place on the ballot at the July 25, 1942 Democratic Party primary election.

Mr. Alex D. Demny was the only person on the July 25, 1942 Democratic Party primary ballot for the position of Constable of Precinct No. 8 and received 254 votes.

XXII

No person was indorsed by the Jaybird Democratic Association for the position of Constable of Precinct No. 2 at the Association May 1942 membership ballot and at the Democratic Party primary election of July 25, 1942 Mr. Otto Hackstedt secured the Democratic nomination over Mr. L. R. Pratka by a vote of 276 to 274.

XXIII

At the Jaybird Democratic Association May 1942 primary, Mr. J. E. McFarland secured the indorsement for Constable of Precinct No. 3.

In the July 25, 1942 Democratic Party primary, Mr. McFarland was defeated by Mr. H. Robinson by a vote of 114 to 100.

[fol. 51]

XXIV

In May 1944, Jaybird Democratic Association voting for indorsement for Constable of Precinct No. 1, L. H. Goss received 795 votes, Ernest Kubala received 688 votes, and W. S. Adkins, who was not on the ballot, received 38 "write-in" votes.

At the Democratic Party primary election of July 22, 1944, Mr. L. H. Goss received 743 votes and Bill Adkins received one vote, they being the only two persons on said Democratic Party primary ballot for the position.

According to the poll list in the office of the Tax Assessor-Collector of Fort Bend County, Texas, the voting precincts constituting Constable Precinct No. 1 had a total voting strength of 1684 in the election year 1944.

XXV

At the Jaybird Democratic Association run-off primary in June 1948, Mr. R. G. Dearing secured the Association indorsement for County Commissioner of Precinct No. 3 by vote of 296 to Mr. Davis' 206.

In the July 24, 1948 Democratic Party primary, Mr. R. G. Dearing lost the Democratic nomination for County Commissioner of Precinct No. 3 to Mr. I. G. Wirtz; Mr. Dearing receiving 270 and Mr. Wirtz 481 votes.

[fol. 52]

XXVI

The total number of qualified voters is not immediately available to the parties for the period prior to February 1, 1944; but the total number of voters as furnished by the Tax Assessor-Collector of Fort Bend County, Texas, from the poll lists on file in his office are as indicated in the following tabulation. Column 1 below shows the voting year; Column 2 shows the total vote in the Jaybird Democratic Association May primary; Column 3 shows the vote in the Jaybird Democratic Association June run-off primary; Column 4 below shows the total vote in the Democratic Party July primary; Column 5 shows the total number of eligible voters in the county according to the poll list.

1938	3817	3919	3775	Not Available
1940	4358	3564	3884	Not Available
1942	3154	2990	3031	Not Available
1944	3790	1867	2032	3910
1946	3309		2996	4460
1948	4055	3456	3108	3856

In the following non-voting years the total of the poll lists were as shown:

1945	4750
1947	5529
1949	5659

The Kendleton Community, wherein three of the plaintiffs reside, is in Commissioner's Precinct No. 2 and voting Precinct No. 2.

In the May 1948 Jaybird Democratic Association primary twelve votes were cast out of a total of 72 persons on

the poll list from the Tax Assessor-Collector's office. [fol. 53] In Commissioner's Precinct No. 2 a total of 1269 votes were cast at the June 1948 Jaybird Democratic Association run-off primary for County Commissioner No. 2.

In the Democratic Party July 24, 1948 primary election in said County Commissioner Precinct No. 2 a total of 273 votes was cast.

In the voting precincts constituting County Commissioner's Precinct No. 2 the poll list in the Tax Assessor-Collector's office shows qualified voters for the voting year 1948 total 1,037.

XXVII

Plaintiff, John Terry, is 77 years of age. Plaintiff Jessie Byers (Bais) is 65 years of age. Plaintiffs, Pink, Roberts and Jackson have paid poll taxes for the current voting year; and for each of the years since the decision of the Supreme Court of the United States in the case of Smith vs. Allbright.

Plaintiffs each own real estate in Fort Bend County, Texas, and are resident citizens of said county.

XXVIII

None of the Plaintiffs have ever applied for a position on the July Democratic Party primary ballot for any office; nor have they sought such filing by or on behalf of any other person.

Plaintiffs are not members of any local political organization but Plaintiffs Terry, Pink, and Bais (Byers) are members of the National Association for the Advancement of Colored People.

[fol. 54] XXIX

It is agreed that any and all claims involved in this cause for and relating to money damages to plaintiffs and other persons, and against defendants and other persons, are expressly waived; and any judgment entered in this cause shall provide that no money damages are awarded. In this connection it is further agreed that defendants will not make any point or contention that the failure of plaintiffs to seek money damages or their waiver thereof renders

plaintiff's action defective for that cause; all parties having agreed that the element of damages is not a necessary predicate to the prosecution of plaintiffs' cause herein.

In Witness Whereof, the parties hereto have executed this Stipulation by and through their respective attorneys of record, on this 24th day of April, 1950.

Allen, Smith, Neal & Lehmann, J. Edwin Smith, Attorneys for Plaintiffs. Townes & Townes, E. E. Townes, Edgar E. Townes, Jr., R. R. Pearson, C. I. McFarlane, Attorneys for Defendants.

[fol. 55] IN UNITED STATES DISTRICT COURT

QUALIFIED STIPULATION—Filed April 24, 1950

The matters herein contained are not stipulated by plaintiffs in the above cause within the sense that Plaintiffs agree thereto but it is agreed that the matters set forth in the following paragraphs may be read by Defendants on any trial or hearing of this cause, as Defendants statements with reference to said matters, the same as though each of said matters herein after set forth were introduced into evidence by testimony of witnesses testifying personally; and the Plaintiffs make no objection to the reading of the following paragraphs:

In seeking to understand the Jaybird Democratic Association of Fort Bend County, Texas, it is necessary to keep in mind conditions throughout the South during the so-called Reconstruction Period, and particularly in those localities like Fort Bend County where the Negroes greatly outnumbered the whites. In the registration of voters from May to September 1867 there were admitted to registry 153 white voters and 1334 colored voters in the county. The State was placed under military rule; county officials were appointed and removed at will under military authority. When military control was discontinued, county and precinct offices were held over by the group theretofore in control, most of the white members of which had come into the county after the War. The colored people, only recently freed, were controlled by the white newcomers.

[fol. 56] The result was a county government of dishonesty, corruption, graft and also of arrogance toward the native white citizens. The county officials were not interested in orderly honest government, the enforcement of law, the prevention of crime or its adequate punishment. The native white people tried by personal persuasion and by appeal, both to the white members of the ruling organization and also to the Negroes, to bring about some betterment of official conditions and conduct, but to no avail.

Most, if not all, of the white people excluded from participation in voting or political affairs were Democrats. As time passed on and a greater percentage of the Democrats began to be permitted to vote, different groups among them sought to organize and support candidates for office, but without success.

Finally the condition became so intolerable that the Democrats, joined perhaps by a few good Republican citizens, decided to organize an association of white citizens to be known as the "Jaybird Democratic Association of Fort Bend County", stating their object thus: "The object of this association shall be to secure to the people of Fort Bend County economic and honest county government and the election of honest and faithful county officials". "Every bona fide white citizen of Fort Bend County shall be eligible to membership in this association." This was in 1889.

Throughout the years the membership of the association has, by some method, ascertained whom the majority of its members desired to support for various county and precinct offices. For a period, it determined the preference of its members at mass meetings of the membership, before which mass meetings were placed the names of those [fol. 57] who desired to seek office or whose friends desired to present and support them. Later the method was changed to a ballot voting system paralleling in general form and method the system set up by state law for political party government.

Those candidates selected as preferred by the membership of the Association by whatever method was followed were advised of their selection. The news of the result of voting in the Association was spread by word of mouth, newspaper and any other available news channels.

With the announcement of the selection of the candidates preferred by the membership of the Association, the organization's connection with the matter terminated.

In Witness Whereof, the parties hereto have executed this stipulation by and through their respective attorneys of record, on this the . . . day of April, 1950.

Allen, Smith, Neal & Lehmann, J. Edwin Smith, Attorneys for Plaintiffs. Townes & Townes, E. E. Townes, Edgar E. Townes, Jr., D. R. Pearson, G. G. Roane, C. I. McFarlane, Attorneys for Defendants.

[fol. 58] In United States District Court

Reporters Transcript of Evidence—Filed April 29, 1950

Appearances:

For the Plaintiff: Messrs. Allen, Smith, Neal and Lehmann, Sterling Building, Houston, Texas, by Edwin J. Smith, Esq.

For the Defendant: Messrs. Townes and Townes, 1312 Esperson Building, Houston, Texas, by E. E. Townes, Esq., and Edgar E. Townes, Jr., Esq,. Clarence I. McFarlane, Esq., Commerce Building, Houston, Texas. George G. Roane, Esq., 2208 Avenue H. Rosenberg, Texas.

Colloquy Between Court and Counsel:

The Court: I am ready to go forward in Civil Action 4135, John Terry versus A. J. Adams. Do you want to call all the witnesses on both sides and have them sworn?

Are you ready for the defendant, Counsel?

Mr. Townes, Jr.: Do you want them sworn now?

The Court: All the witnesses on both sides.

Mr. Smith: If the Court please, we will have one witness, one of the plaintiffs, who has been temporarily mud-bound. But we are getting him out of the mud and getting him in because we want to use him.

[fol. 59] The Court: All right. Have the witness sworn.

(The witnesses were sworn.)

The Court: Is the rule invoked?

Mr. Smith: Not on the part of the plaintiff.

Mr. Townes, Jr.: We don't care to invoke the rule, Your Honor.

The Court: The witnesses may be seated in the Court room.

Mr. Townes, Jr.: Perhaps, if the Court please, there will be one or two more witnesses we might call who have not arrived yet.

The Court: All right. On what pleading is the plaintiff going to trial?

Mr. Smith: Original complaint, Your Honor.

The Court: Filed when?

Mr. Smith: Filed on March 16, 1950.

[fol. 60] The Court: And the defendant is going to trial on what pleading, please, sir?

Mr. Townes, Jr.: Your Honor, Mr. Smith and I have been so busily engaged in trying to get together on the stipulation that I find in my file this morning my pleadings have not actually been filed.

The Court: I see. Well, you can file them now.

Mr. Townes, Jr.: We conferred about them and Mr. Smith had a copy. We had, Your Honor, a motion to dismiss. However, knowing that the case would take the one day it would be entirely all right with us for the Court to carry it along with the case. And then we have our original answer.

The Court: Motion to dismiss. All right. Is that agreeable to other counsel, to carry the motion along with the case?

Mr. Smith: Yes, sir.

The Court: Suppose you state your case for the plaintiff.

(Mr. Smith stated the case for the plaintiff and Mr. Townes Jr. stated the case for the defendant).

The Court: That about states your case, does it?

[fol. 61] Mr. Townes, Jr.: I believe so, sir.

The Court: Now, you have a stipulation. Suppose you file it with the Clerk and then read it. Is it signed by—

Mr. Smith: If the Court please, we expect to prove some of the facts of the stipulation.

The Court: I understand that. The stipulation has been signed, has it not?

Mr. Smith: Yes, sir.

The Court: I think I can get a lot of information from your stipulation if you will read it. Suppose you read it.

(The stipulation was read to the Court by Mr. Smith).

Mr. Smith: I might state, Your Honor, subject to the fact that we do not waive any jurisdiction right, which we do not think we do, we are asking only for equitable relief and not for money damages. Our contentions are for the right to vote.

The Court: It seems to me, Gentlemen, I ought to thank you for the stipulation. It occurs to me you have saved a lot of time for yourself and the Court.

[fol. 62] Mr. Smith: Yes, saved a lot of quibbing.

The Court: I may change my mind if you put on a lot of witnesses but I will be glad to hear you. We will take a recess of ten minutes.

(Short recess).

The Court: Be seated. You may proceed for the plaintiff.

Mr. Smith: If the Court please, we would like to call Mr. A. J. Adams to the stand, please.

The Court: Mr. who? Mr. A. J. Adams?

Mr. Smith: A. J. Adams, yes, sir.

A. J. ADAMS, was called as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Smith:

Q. Your name is A. J. Adams?

A. Yes, sir.

Q. And you are now President of the Jaybird Democratic Association of Fort Bend County, Texas?

[fol. 63] A. Yes, sir.

Q. Will you answer out loud, please, sir?
A. Yes.
Q. And how long have you held that office?
A. About two months.
Q. About two months. Who was your predecessor in office?
A. Mr. Darst.
Q. Mr. Darst?
A. Yes.
Q. And his initials are what?
A. R. H., I believe.
Q. He is called Mr. Robbie Darst?
A. Robbie Darst.
Q. Mr. Adams, I believe that you have heard certain parts of the stipulation read?
A. Yes.
Q. I will ask you if it is not true that your organization is made up of representatives from all the precincts in the county?
A. Yes.
Q. Now does your executive committee have a representative on it from each precinct in the county?
A. Yes.
Q. Now that member of that executive committee is chosen how?
A. By vote of the—
Q. By vote. And that is the same as is done in the election of the executive committee for the county for the Democratic Party, is it not?
A. Yes.
Q. And you follow the same procedure, do you not?
A. Practically.
Q. And that is true as to most of the things about it, is it not?
[fol. 64] A. Yes.
Q. That you do follow the same general procedure except that you don't have it on the election days?
A. That's right.
Q. Now Mr. Adams, I will ask you, are you on the executive committee of the Jaybird Association?
A. I am the President.

Q. You are also on the executive committee by virtue of your office?

A. Yes.

Q. Are you also on the Democratic Committee?

A. No.

Q. Is Mr. Darst on the executive committee?

A. Yes.

Q. Is he also on the Democratic Committee?

A. I don't know.

Q. Now I will ask you if you know of any overlapping between the two committee memberships?

A. I—

Mr. Townes, Jr.: If Your Honor please, that would be immaterial and irrelevant, I believe, because they are two different associations and membership in either does not affect membership in the other.

The Court: I will take the objection with the case. I don't think the objection is well taken, but—

Q. Mr. Adams, do you know whether any of the members of your Jaybird committee are also members of the Democratic county committee?

A. Yes.

Q. About how many?

[fol. 65] A. I wouldn't know.

Q. Well, are they few or many?

A. Just a few of them.

Q. Just a few of them. Now I will ask you, Mr. Adams, the elections you hold are held open to the whole public?

A. Yes.

Q. Of Fort Bend County, Texas, are they not?

A. Yes.

Q. And don't you make—doesn't the membership of your Association actually comprise the voting list with the exception of the negro citizens?

A. Practically, yes.

Q. That is true, is it not?

A. Yes.

Q. So that you overlap and take in for your membership the whole voting population of Fort Bend County, Texas, with the exception of the negro citizens?

A. Yes.

Q. Now Mr. Adams, you have no club such as the Lions Club in this Association?

A. No.

Q. Or the Rotary Club?

A. No.

Q. You have no weekly meetings for lunch or anything of that kind?

A. No.

Q. You have no clubhouse, do you?

A. No.

Q. You have no club recreations or anything of that kind, do you?

A. No.

Q. The only thing you do to make up and comprise your membership is to say publicly that your membership is made up of the voting list of the county with the exception of the negro citizens?

A. Yes.

Q. And that is true as to each and every precinct, isn't it?

[fol. 66] Yes.

Q. Now when your men vote, when the people vote in your elections, you use the voting precinct lists that are prepared by the county, do you not?

A. Yes.

Q. By the County Clerk?

A. They have to be a tax payer, poll tax payer.

Q. And you obtain the voting list for your primary from the same place that the Democratic Party does?

A. Yes.

Q. And from the same place that they do for the general election?

A. Yes.

The Court: Do you pay for that when you get it?

A. No, sir.

The Court: All right.

Q. You get them for nothing?

A. Yes.

The Court: Can anybody get them for nothing?

A. I have on occasion gotten them for nothing, yes, sir.

Q. Now Mr. Adams, the person who comes to vote in your primary must present a poll tax, must he not?

[fol. 67] A. Yes, or pay on the poll tax.

Q. All right. He must have a poll tax in order to vote?

A. Yes.

Q. Or if he doesn't have a poll tax and is over sixty I believe you let him vote?

A. Yes.

Q. Now in your county you don't have to have a certificate of over age, do you?

A. No.

Q. It is within the population area where you can vote merely by making an affidavit that you are over sixty?

A. Yes, sir.

Q. Now in your executive committee you require candidates to make application to be on your ballot, I believe, according to the stipulation?

A. Yes.

Q. That same thing is done by the Democratic Party, is it not?

A. Yes, I think so.

Q. In other words, the procedure you follow sort of parallels the election procedure set up by statute, does it not?

A. Yes.

Q. Now Mr. Adams, it is the purpose and intent of your organization to try to get the people you endorse or nominate, whatever you call it, into the offices, isn't it, of the county?

A. Yes.

Q. That is your purpose?

A. We endorse them for that purpose.

Q. For the purpose of getting them elected to office.

A. Yes.

Q. Now Mr. Adams, will you state whether or not you have always held your election primaries at the time you now hold them?

[fol. 68] Well, I don't know. It would not be the same date but it was always before—in May, April.

Q. I will ask you to state whether or not the Jaybird Association has ever in its history held elections on the same day that the Democratic Party held its elections?

A. No.

Q. According to your knowledge?

A. According to my knowledge, no.

Q. I will ask you for how many years has the Jaybird Democratic Association been successful in electing members to offices in county-wide offices?

A. Well, some years they don't, aren't successful.

Q. I will ask you whether or not there have been any persons in your memory elected to the office of Sheriff who was not endorsed by your Association?

A. No.

Q. There has not, has there?

A. Not yet, no.

Q. I will ask you whether or not in your memory anybody has been elected to office for the office of District Clerk who was not endorsed by your Association?

A. No.

Q. They always have been in your memory, haven't they?

A. Yes.

Q. Now is it not true that as far as you can remember everybody who has been elected to the office of County Clerk has been endorsed by your Association?

A. Yes.

Q. That is true, isn't it?

[fol. 69] A. Yes.

Q. I will ask you whether it is not true that as far as you can remember that the person who has been elected to the office of County Judge has been nominated or endorsed by your Association?

A. Yes.

Q. That is true, is it not?

A. Yes.

Q. And that is true, is it not, of all officers who have county-wide jurisdiction?

A. No.

Q. What are some of the exceptions?

A. Well, the County Commissioner.

Q. Well, I am not talking about precincts. I am talking about county offices.

A. Yes, that's right.

Q. Now it is true that as to county offices, as far as you can remember, everybody who has been elected has been endorsed or nominated by your Association?

A. Yes.

Q. And the only exceptions you know of are in precincts, aren't they?

A. Yes.

Q. Most of those exceptions you know of reside in precinct 3, do you know?

A. Yes.

Q. And one of the exceptions is that Mr. Wirtz has a time or two been elected to the office of Commissioner?

A. Yes.

Q. In opposition to your organization.

A. And one other.

Q. Another Commissioner?

A. No, a constable.

Q. But all officers who have county-wide jurisdiction, as long as you can remember, have been the endorsees of your party?

A. Yes.

Q. Now you heard the stipulation that goes back to 1938, in which it says that in most instances since 1938 [fol. 70] there has been only one name on the Democratic ballot for each office?

A. Yes.

Q. And that one name, in most instances, has been the nominee or endorsee of your organization?

A. Yes.

Q. Isn't the same also true prior to 1938?

A. Yes.

Q. That is true in most cases?

A. Most cases, yes.

Q. There is only one name on the ballot in the Democratic primary?

A. Yes.

Q. And that name is the one endorsed by your Association?

A. Yes.

Q. Mr. Adams, it is true, is it not, that the candidates actually publicize and carry on a public campaign for approval or nomination or endorsement by your Association?

A. Yes.

Q. It is true, is it not, that they put up posters announcing to the public that they are running for nomination or subject to the Jaybird primaries in May, don't they?

A. Yes.

Q. I will hand you a poster that is put up by Sheriff candidate Mr. Alva McGill and ask you if you recognize that?

A. Yes.

Q. Now that poster shows, and states on it, announces to the public, that he is running in a public election subject to the action of the Jaybird primaries in May, does it not?

A. Yes.

[fol. 71] Mr. Smith: Will you mark these, please?

(Documents were marked Plaintiff's Exhibits 1, 2, 3 and 4 respectively).

The Court: Are you offering them?

Mr. Smith: I am offering that in evidence, yes sir.

The Court: All right.

(Plaintiff's Exhibit 1 was received in evidence.)

The Court: This says: "Subject to the action of the Jaybird primaries in May and the Democratic primaries in July."

Mr. Smith: That is what we expect to show, yes, sir.

The Court: It sounds like if he is defeated in the Jaybird primaries in May that he can still go on running in July.

Mr. Smith: We are not making the contention that he cannot. We are showing what it says here, Your Honor.

A. That's what he can do.

The Court: You say he can do that?

[fol. 72] A. Yes, sir.

The Court: If he is defeated in your primaries he can keep right on running?

A. Yes, sir.

Q. I will hand you what has been marked Plaintiff's Exhibit No. 2. That is a similar thing concerning a different candidate, is it not?

A. Yes, sir.

Q. It says: "Subject to the Jaybird primaries in May and the Democratic primaries in July"?

A. Yes, sir.

The Court: All right.

(Plaintiff's Exhibit 2 was received in evidence.)

Q. Now your candidates out there put out other literature in the nature of blotters and cards, do they not? And I hand you Exhibit 3 for illustration.

A. Yes.

Q. And that is part of the literature used in making it subject to the Jaybird and the Democratic primaries?

A. Yes.

Q. I will ask you whether or not—do they not publicize and put in the newspapers political announcements in which they say they are subject to the Jaybird primary in May and the Democratic primary in July?

A. Yes.

Q. And hand out various types of cards reciting the same thing?

A. Yes.

[fol. 73] Q. I will hand you what has been marked Plaintiff's Exhibit 4 with a number of cards and political announcements attached and ask you if that doesn't give the general information on things like that and the general idea of how they campaign?

A. Yes. I see two here that is not on the Democratic—not—

Q. Yes, just on the Democratic. But I am talking about they are under that heading?

A. Yes.

Q. And that is carried in the newspapers frequently for several weeks prior to the election, is it not?

A. Yes.

(Plaintiff's Exhibit 3 and 4 were received in evidence.)

Q. Now Mr. Adams, do you have the constitution of the Association with you?

A. No.

Q. Do you have one available with your counsel?

A. Yes.

Mr. Smith: May we see it?

Mr. Townes, Jr.: I didn't understand that.

Mr. Smith: The constitution.

Mr. Townes, Jr.: For the record, Your Honor, this is a photostatic copy of what we understand to be a printing of the original constitution and by-laws of the Jaybird Democratic Association of Fort Bend County. There have been [Vol. 74], from time to time amendments and elaborations to it but for counsel's point it is the same now, I think, as it was at the time that was adopted in 1889. There have been procedural amendments and insertions and changes.

Q. Mr. Adams, please state whether or not your Association uses any policy or mode of enforcing the fact that your candidates or the people of the county must abide by the rules and policies?

A. No.

Q. They don't?

The Court: Speak out a little louder.

Q. I will ask you whether or not you have in your constitution any provision providing for enforcing by some type of means the results and the desires of your organization?

A. Well, it might have been at one time. I don't remember. But we don't now.

Q. You don't now?

A. No, not since I have been—

Q. Not since you have been—

A. No.

Q. And you are operating under the constitution?

A. Yes.

Q. I will ask you whether or not the constitution does not declare in its provision, Article 15, as follows:

"We therefore declare that any white man now residing in this county, or who shall hereafter acquire citizen-

ship in this county, who shall undertake to lead against this association any political faction or voting population opposed to the principles and subjects of this association, [fol. 75] shall be considered and treated as a social and political outcast."

A. Yes.

Mr. Smith: That is in your constitution. We offer that in evidence, if the Court please.

Mr. Townes, Jr.: You mean the whole constitution?

Mr. Smith: No, that provision.

The Court: Have it marked.

(Article 15 of the constitution was marked Plaintiff's Exhibit 5.)

Mr. Townes, Jr.: Your Honor, I'd like, if Counsel is going to offer part, that the whole thing go in so that by selectivity or elimination no destruction distortion will result [E. E. T. J. J. E. S.]

The Court: I don't think he can be required to offer the whole constitution unless he wants to do so. What part are you offering?

Mr. Smith:

A. I was offering the part I read, Your Honor, about they declare them to be political and social outcasts.

[fol. 76] The Court: Does it have a number or section?

Mr. Smith: Article 15.

The Court: That is all you are offering?

Mr. Smith: Yes, sir. I have the part marked.

The Court: Do you enforce that provision now?

A. Yes, sir.

The Court: Article 15?

A. Yes, sir.

The Court: All right.

(Plaintiff's Exhibit 5 was received in evidence.)

Mr. Smith: That's all. Excuse me, one other question.

Q. If I understand, you did say you enforce that provision now?

A. No, we don't enforce that provision now.

Q. What did you just tell the Court?

[fol. 77] A. I told him that was in the constitution but we did not enforce it right now. You understood me to say that, did you Judge?

The Court: I understood you to say first that you did enforce it.

A. No, we don't.

The Court: You don't enforce it now?

A. We don't enforce it now.

Mr. Smith: That's all.

Cross-examination.

By Mr. Townes, Jr.:

Q. Mr. Adams, you have heard my statement about this being a photostatic copy of what we understand to be the printed booklet of the original constitution and by-laws of the Association?

A. Yes, sir.

Q. I will ask you to glance over it, if you will, the entire booklet, the marked as well as the unmarked portion and see if you do identify that as being a copy of the original constitution and by-laws of 1889 of the Jaybird Democratic Association. In other words, the presentation or submission of it by the committee.

A. Yes.

The Court: What is the answer?

[fol. 78] A. Yes.

Q. It shows, does it not, the submission by the committee which was appointed on October 3, 1889, of this proposed constitution and by-laws?

A. Yes.

Mr. Townes, Jr.: Your Honor, we will offer the entire constitution.

Mr. Smith: No objection.

(The constitution and by-laws booklet was marked Defendant's Exhibit 1 and received in evidence.)

Q. With reference to Plaintiff's Exhibit 4, Mr. Adams, the newspaper clipping pasted on the page to which also are stapled some cards, it is marked in pen and ink as being from the Texas Coaster, 3/23/50, Richmond, Texas. Is that the way it is marked, sir?

A. Yes.

Q. Now there are two sections, are there not, to that newspaper item, captioned "Political Announcements": The top section being with reference to parties: "subject to the action of the Jaybird primaries in May annd the Democratic primaries in July 1950." And the second being with reference to persons: "subject to the action of the Democratic primaries in July 1950."

A. Yes.

Q. Now those subject to the action of the Democratic primaries in July 1950 only show: "For Commissioner Precinct No. 3: I. G. Wirtz". Is that correct?

A. That's right.

Q. And: "For Constable Precinct No. 3: E. D. Battle."

A. That's right.

[fol. 79] The Court: Those two are not running for the Jaybird primaries?

A. No, sir.

Q. Now Mr. Adams, I will ask you whether, as have Mr. Wirtz and Mr. Battle, other persons qualified under the statutes to hold office, may file for positions on the Democratic ballot for July 1950, the Democratic primary ballot, whether or not they are also endorsees of the Association?

A. Yes.

Q. Do you happen to recall off hand whether Mr. Wirtz or Mr. Battle applied for position on the Jaybird primary ballot for May 1950?

A. They did not.

Q. Do you know whether any of the plaintiffs in this case have ever filed an application for a position on the Democratic Party primary ballot for the fourth Saturday in July of any election year?

A. Repeat that again.

(The last question was read.)

A. No, I don't.

Q. You are without information one way or the other about that?

A. Yes, I am. I don't know whether they have or not.

Q. Mr. Adams, with reference to the Jaybird Democratic Association executive committee, is it true that the return from the balloting of your Association members in the May Jaybird Association primaries are delivered to the executive committee for canvassing?

A. Of the Jaybird committee?

Q. Yes.

A. Yes, sir.

[fol. 80] Q. Now when those returns from the various Association membership voting places are delivered to the executive committee of the Jaybird Democratic Association for canvassing, does the executive committee canvas those returns and announce the results of the membership voting at the May primary?

A. Yes.

Q. It is true that a person must have a clear majority of all votes cast for a particular position before he is declared to be the endorsee of the Association?

A. Yes.

Q. In the event there are more than two persons on the Jaybird May primary ticket for a particular position and no one of them receives a clear majority of all the votes cast, am I correct that there is what is designated as a run-off in June?

A. Yes.

Q. Between the two high men?

A. Yes.

Q. And does the executive committee of the Jaybird Democratic Association then canvas the returns of the June balloting of the membership?

A. Yes.

Q. And it then announces the result of that balloting?

A. Yes.

Q. And the high man is declared the endorsee or nominee, whatever term is applied, of the Jaybird Democratic Association for the particular position?

A. Yes.

Q. After the Jaybird Democratic Association executive committee so canvasses the returns in the May and in the June membership balloting and announces the result, I will ask you whether or not the Jaybird Democratic Association of Fort Bend County, Texas, or the executive com- [fol. 81] mittee of that Association, further participates in securing the election of those persons?

A. No, they don't.

Q. I will ask you whether upon canvassing the returns and announcing the results, the activity, you might call it, of the Jaybird Democratic Association and of its executive committee ceases?

A. It does.

Q. Mr. Adams, I will ask you whether or not there is any pledge of any kind printed on the Jaybird Democratic Association primary ballot?

A. Not that I have ever seen.

Q. Now you have voted in the May and in the June Jaybird Association primaries during the years, have you not?

A. Yes.

Q. Had there been any type of pledge printed on the ballot you would have seen it, would you not?

A. Yes.

Q. I believe, Mr. Adams, you some time back, filed an application with the executive committee of the Jaybird Democratic Association of Fort Bend County for a place on the May Jaybird Association primary ballot?

A. Yes.

Q. Did or did not other persons also file applications with the Association executive committee for the same position on the Jaybird May ballot?

A. Yes.

Q. I will ask you whether you did or did not receive the majority vote of the Association membership at the May primary that year for the particular position?

A. I did not.

Q. I will ask you whether or not you know whether the man who did receive the larger vote at the May Jaybird primary later applied for a position on the Democratic Party primary ballot in the July primary election?

[fol. 82] A. Well, we had a run-off. It was three of us running. They had a run-off and one of them got the majority and he was placed on the Democratic. He was placed on the Democratic.

Q. In other words, the man who was finally successful in the June run-off primary of the Jaybird Democratic Association did file an application for a position on the July Democratic Party primary ballot?

A. Yes.

Q. I will ask you whether or not you recall how he came out at that July Democratic Party primary?

A. He was defeated.

Q. Do you recall who defeated him?

A. Mr. I. G. Wirtz.

Q. I will ask you whether or not Mr. Wirtz, in that July Democratic Party primary, was endorsed by the Association and its members?

A. No.

The Court: What percentage of the white population of Fort Bend County participates in the Jaybird primaries?

A. Well, Judge, it depends on how the race is. Some years it is a great deal more than others and I guess a big majority of the white people vote in that primary. But some off years it depends how hot the campaign is.

The Court: I see; all right.

Q. Now how many consecutive times, Mr. Adams, can a person be ruled eligible by the executive committee of the Jaybird Democratic Association to stand for election for a particular position?

[fol. 83] A. Twice.

Q. Now is that twice in succession?

A. Twice in succession, yes, sir.

Q. Could you tell us a little bit more about that, please, sir, directing your attention to the application that a particular person might file with the executive committee of the Jaybird Democratic Association and the action of that executive committee on it and that person's subsequently being on the Jaybird Party Association primary ballot. And then, if he is successful there, with reference

to his application for a position on the Democratic Party July primary ballot. With reference to his having, that person's having held an office for two consecutive terms.

A. Well, the Jaybird doesn't endorse a man that has had two terms. And he is—he runs on his—sometimes he is elected and sometimes he is not. The Jaybird don't require to vote against any man on the Democratic Party primary.

Q. In other words, the Jaybird Democratic Association does not require or attempt to require its members to vote against any particular person in the Democratic Party July legal primary?

A. No, not as far as the Association goes.

Q. So in the Democratic July primary the members vote their convictions?

A. Yes, sir.

Q. If I understand you correctly, the Jaybird Democratic Association does not subscribe to the policy or rule of the Democratic Party permitting more than two consecutive terms in office?

A. No.

Q. I will ask you whether the executive committee of the Jaybird Democratic Association rejects the application for a position on the Jaybird May primary ballot of a man who has held the particular office two terms successive?

A. Yes, they reject it.

[fol. 84] Q. Now is there any provision, also, with reference to a man laying out, you might say, for a period after he has held office two consecutive terms?

A. He can come back and be nominated, selected by the Jaybird Party—Jaybird Association.

Q. How long must he not be an office holder of any kind?

A. One two-year term.

Q. A two-year term?

A. A two-year term, yes, sir.

Mr. Townes, Jr: No further questions at this time, Your Honor.

The Court: Stand aside.

Mr. Smith: I had another question I wanted to ask him on redirect, if the Court please.

The Court: All right.

Redirect examination.

By Mr. Smith:

Q. Mr. Adams, does the Jaybird Association make any provision for voting absentee ballots?

A. I don't know; I don't remember—

Q. Well, isn't it a fact that they vote absentee ballots in the Association?

A. I don't remember of any.

Q. You wouldn't say yes or no?

A. No, I wouldn't say yes or no.

[fol. 85] Now I will ask you to state, it is a fact, is it not, that the official name of your organization is the Jaybird Democratic Association of Fort Bend County?

A. Yes.

Q. And it is sometimes known roughly as the Jaybird Party, isn't it?

A. No.

Q. You never heard it called that?

A. No, not officially, no.

Q. I am not talking about officially.

A. Oh, it might be called anything.

Q. Now isn't it a fact that out there a lot of the people refer to it as the Jaybird Party?

A. Well, they might, yes.

Q. And you have heard that often, haven't you?

A. Not that I know of.

Q. Not that you know of. Now Mr. Adams, will you tell me specifically what is the specific purpose of holding these elections and carrying on this organization like you do?

A. Good government.

Q. Now I will ask you to state whether or not it is the opinion and policy of the Association to carry on good government they must exclude negro citizens?

A. Well, when we started it was and it is still that way, I think.

Q. And then one of the purposes of your organization

is for the specific purpose of excluding negroes from voting, isn't it?

A. Yes.

Q. And that is your policy?

A. Yes.

Q. I will ask you, that is the reason you hold your election in May rather than in June or July, isn't it?

A. Yes.

[fol. 86] Q. Because if you held it in July you would have to abide by the statutes and the law letting them vote?

A. They do vote in July.

Q. And if you held yours at that time they would have to vote, too, wouldn't they?

A. Why sure.

Q. And you hold it in May so they won't have to?

A. Well, they don't vote in ours but they can vote on anybody in the July election they want to.

Q. But you are not answering my question. My question is that you hold yours in May so you won't have to let them vote, don't you?

A. Yes.

Q. And that is your purpose?

A. Yes.

Q. And your intention?

A. Yes.

Q. And, to have a vote of the white population at a time when the negroes can't vote, isn't that right?

A. That's right.

Q. That is the whole policy of your Association?

A. Yes.

Q. And that is its purpose?

A. Yes.

Mr. Smith: That's all.

The Court: Call your next witness.

Mr. Townes, Jr.: One or two more questions, Your Honor.

[fol. 87] Recross-examination.

By Mr. Townes, Jr.:

Q. Now as to the last question or two there, Mr. Adams, do you know of any time that anyone in all the recent

years has tried to keep the negro from voting at the July Democratic election?

A. No.

Q. Or at the general election in November?

A. Never have.

Q. Is there anything to keep every qualified voting member of the negro race in Fort Bend County from voting in the July Democratic primary held on the fourth Saturday in July as specifically provided by the statutes?

A. Nothing to prevent them, no.

Q. Is there anything to prevent any member of the negro race or any member of any other race, qualified to hold office, from securing a position on the Democratic Party primary ballot in July of each election year?

A. No, there is not.

The Court: Well, of course, we all know that. That is argumentative in a way.

Q. You do, under the Jaybird Democratic Association constitution and rules, limit the membership of the Association to white people?

A. That's right.

Q. And therefore on each balloting of the Association membership, voters are limited to white people?

A. That's right.

Mr. Townes, Jr.: I believe that's all.

[fol. 88] The Court: We are going to run a little late today.

Mr. Smith: One other question, Mr. Adams.

Redirect examination.

By Mr. Smith:

Q. It is true, is it not, that in the great majority of the cases the actual election of officers is determined at the Jaybird primary?

Mr. Townes, Jr.: If Your Honor please, that is obviously calling for a legal conclusion contrary to the express provisions of the statute.

The Court: Read the question.

(The last question was read.)

Mr. Smith: I will put it "in practice."

The Court: I think you may frame your question differently as to whether as a rule those endorsed by the Jaybird primary are nominated, if you choose to call it, in the July primary.

Q. I will put the question again. It is true, is it not, that in the great majority of cases after the Jaybird nominee has been determined, then he has no opposition in the Democratic primary nor in the general election?

A. That is true.

[fol. 89] Q. That is true?

A. Most of the time.

Q. In the great majority of cases, isn't it?

A. Yes.

Q. And to follow up on that, as far as you can remember there has been nobody elected to a county-wide office who was not first nominated or endorsed by the Association?

A. That's right.

Q. Now he asked you on recross examination there about the fact that the negro citizens could vote in the July primaries, which we concede. But the purpose of your organization is to determine the vote at an election in which they cannot vote, isn't it?

A. Yes.

Q. And the great majority of the white voters vote in that election, do they not?

A. Yes.

Q. And as many vote there as do in the primary of the Democratic Party?

A. Well, I don't know about that.

Q. It is about the same thing?

A. It is about the same.

Mr. Smith: All right.

The Court: Stand aside. Call your next witness.

Mr. Smith: If the Court please, I'd like to call Mr. Darst.

[fol. 90] R. M. DARST, was called as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. You are Mr. Robbie Darst?
A. I am R. M. Darst.
Q. Sometimes known as Robbie Darst?
A. That's right.
Q. Mr. Darst, do you know whether or not in the Jaybird Association there is any provision for voting absentee ballots?
A. I don't know.
Q. You don't know?
A. I don't recall.
Q. I will ask you to state whether or not it is not true that in the great majority of the cases the Jaybird nominees are elected to public office?
A. Yes, that is true.
Q. That is true. I will ask you whether or not you yourself sometimes have not heard this Association referred to as the Jaybird Party?
A. Well, not particularly, no. We go as the Jaybird Association.
Q. And you would not say one way or the other about that; whether it is referred to as that or not?
A. As I say it, I always refer to it as the Association.
Q. As the Association?
A. That's right.
Q. Now Mr. Darst, the purpose of this Association there is to get a vote at a time when the negroes can't vote, isn't it?
[fol. 91] A. Well, not particularly. I don't think we paid much attention to it. We didn't know they wanted to vote. We just went on and had our election.
Q. Your constitution specifically provides that they cannot, doesn't it?
A. That's right.
Q. And you have followed that in order to keep from having to let them vote in July, haven't you?

A. Well, I guess not particularly that. We just held our election.

Q. You just held your election at a time when you don't permit negroes to vote?

A That's correct.

Q. I will ask you whether or not in your memory, would you say that the Jaybird primary has always been held in May in advance of the Democratic primary?

A. I believe that is the policy. It has been since I have known it.

Q. Are there any exceptions whatsoever?

A. I don't recall any.

Q. You don't recall any. The purpose of your organization is to elect men to public office, isn't it, that are endorsed or chosen by the Association?

A. We hope to get good men in, yes.

Q. And it is to get them into office and have them run the government?

A. That's right.

Q. That's right, isn't it?

A. That's right.

Q. And your Association is made up of a group of people, is it not?

A. Yes, that's right.

Q. And that includes all of the qualified voters of Fort Bend County, Texas, who are white?

A. That's correct.

[fol. 92] Mr. Smith: That's all.

The Court: Any cross-examination of this gentleman?

Mr. Townes, Jr.: I don't believe we have any questions at this time, Your Honor.

The Court: All right. Stand aside, Mr. Darst. Call your next witness.

Mr. Smith: That's all for the plaintiff. We rest at this time, Your Honor.

The Court: Are you ready to go forward for the defendant?

Mr. Townes, Jr.: Your Honor, at this time after plaintiff has rested and is now through, I would like to urge our earlier filed motion to dismiss and, at this time, motion for judgment.

The Court: Well, I will take the motion for judgment and your earlier filed motion to dismiss with the case.

Mr. Townes, Jr.: All right, Your Honor. We had not anticipated that the plaintiff would rest without testimony from plaintiffs so frankly, we have not decided definitely what witness we should follow with first.

[fol. 93] Is it the Court's pleasure to continue now or do you have in mind recessing a few minutes?

The Court: I was anxious to finish the case today and I had in mind working some on what we usually call the noon hour. How many witnesses are you going to have?

Mr. Townes, Jr.: Your Honor, we have quite a number here. Now whether it will be necessary to put them all on—if the Court could give us about five minutes, perhaps—

The Court: Well, I will tell you what I will do. Suppose we adjourn till one-thirty. Court will recess till one-thirty.

(Noon recess.)

(Afternoon Session.)

The Court: Be seated gentlemen. You may proceed for the defendant.

Mr. Townes, Jr.: Your Honor, there are two paragraphs which follow, as counsel stated, something of the detail in the stipulation; two paragraphs which I do not recall clearly were read out of the stipulation. I would like to read those if I may. I might add that we have added a few words to one of those paragraphs by agreement, of course, and want leave to add it to the original filed.

[fol. 94] The Court: Be sure and ask, before you leave here, to have it corrected.

Mr. Townes, Jr.: We will, sir. The twenty-seventh paragraph:

"The plaintiff John Terry is 77 years of age; plaintiff Jessie Byers is 65 years of age. Plaintiffs Pink, Roberts and Jackson have paid poll tax for the current voting year and for each of the years since the decision of the Supreme Court of the United States in the case of Smith versus Allbright. The plaintiffs each own real estate in Fort Bend County, Texas, and are residents of said county." [E. E. T. J. J. E. S.]

Next paragraph:

"None of the plaintiffs have ever applied for a position on the July Democratic Party primary ballot for any office, nor have they sought such filing for or on behalf of any other person. Plaintiffs are not members of any local political organization. The plaintiffs Terry, Pink and Byers are members of the National Association for the Advancement of Colored People."

A separate paper is also a stipulation but, as will be shown by its introductory paragraph, is not a stipulation in the same sense as the agreed facts in the major stipulation.

Mr. Smith: If the court please, on this particular stipulation we only are agreeing that he may read this as his theory or his evidence without having to call the witnesses to prove it.

[fol. 95] Mr. Townes, Jr.: Further, Your Honor, by mutual agreement to expedite the situation. Counsel does not agree that these are facts, merely that if the witnesses were personally called the testimony would be this in substance.

The Court: Have you got it so marked there?

Mr. Townes, Jr.: Yes, sir.

(The stipulation was read to the Court.)

The Court: Will you file that with the Clerk?

Mr. Townes, Jr.: I will leave this with the Clerk to be filed.

The Court: With the other stipulation.

Mr. Townes, Jr.: Your Honor, as the first witness for the defendants we would like to call Judge D. R. Pearson, whose personal connection with the Association and its aims and purposes goes back to the time of its organization.

The Court: All right.

[fol. 96] D. R. Peareson, was called as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Townes, Jr.:

Q. State your name, please, sir.
A. D. R. Peareson.
Q. Where do you live, please?
A. Richmond, Texas.
Q. Fort Bend County?
A. Fort Bend County.
Q. When were you born, Mr. Peareson?
A. August 2, 1869.
Q. Were you born in Fort Bend County?
A. Yes, sir, I was born in Richmond.
Q. And have lived in Fort Bend County, Texas, all of your life?
A. Lived there all of my life. I am living on the site where I was born.
Q. You are an attorney?
A. Yes, sir.
Q. Do you recall when you first started practising law?
A. When I was admitted in 1890. I didn't do much practice until 1896. I had a father who did the work.
Q. Judge Peareson, do you remember the creation of the organization of the Jaybird Democratic Association of Fort Bend County, Texas?
A. Yes, sir.
Q. It was organized in 1889, was it not?
A. Yes, sir.

[fol. 97] Q. This photostatic copy, a portion of which, Article 15 of which, on page seven, was offered as Plaintiff's Exhibit 5 and the entire booklet offered as Defendant's Exhibit 1, I ask you just to state, please, sir, what is your understanding as to what that booklet is?

A. Well, I understand this is a photostatic copy of the first publication of the original constitution of the Jaybird Democratic Association, except following article

16 there is an amendment to the constitution. That was added after the adoption of the original constitution, as I recall it.

Q. I see. But that in substance is the original constitution of the Jaybird Democratic Association of Fort Bend County?

A. I think so, yes, sir.

Q. That was prefaced by the submission of the report by the committee theretofore appointed to draft the constitution?

A. Yes, sir.

Q. Judge Pearson, prior to the adoption of the constitution, the formation of the Jaybird Democratic Association, what was the general condition of the county as to its administration and its public officials?

Mr. Smith: If the Court please, we just read a stipulation on that.

The Court: Well, will it be any different from the stipulation?

Mr. Townes, Jr.: There will be no difference, Your Honor. The main thing about that question was to lead up to the purpose of the original creation of that organization.

[fol. 98] The Court: All right. If you are just leading up to something that's all right.

A. I don't understand it.

(The last question was read.)

A. I don't believe I understand that. Will you state it to me again, please, sir?

Q. Prior to the organization of the Jaybird Democratic Association, Judge, what was the general condition of the administration of the county, the public officials?

A. Well, it was not very satisfactory to the great body of the people of the county. There had been quite a bit of bad administration. The people, the majority of the people, were not satisfied. The county officers had been selected by combination of some white people and the negro vote. There had been a number of negro officials elected. They would be elected to the offices and the offices would be carried out—the duties of the offices would be performed by white deputies.

An effort was made in 1888, as there had been prior to that time, to obtain a good county government, and in 1888 why there were two tickets placed in the field. One was called the Woodpecker ticket which consisted of the white people who were controlling the negro vote, and the other was called the Jaybird Party, which consisted of the white people of the county.

In that election both sides sought to obtain the negro vote with the result that the Woodpecker ticket was elected [fol. 99] and the Jaybird ticket was defeated, having received only one negro vote. About that time there had been two assassinations, or rather, one assassination and one attempted assassination of white people. One of the men was killed and the other man was badly wounded but recovered. And after that they had what—in the streets there—what was called a fight in which a number on both sides were killed.

After that why this Jaybird Association was formed and as stated in the first part of this article 15:

"The object of this association is to combine and unite the white people for the advancement and prosperity of the county; for the purpose of securing a faithful and honest discharge of official duty by all public servants, and to prevent forever this county from relapsing into the disastrous and disgraceful administration of public affairs which has oppressed this county for a quarter of a century."

Q. I will ask you, Judge Pearson, whether or not it was the effort of the Jaybird Democratic Association in its organization to have as its members those people who were vitally interested in honest, efficient, sound government?

A. That was the object in having the Association.

Q. Now as of the time of the organization—it is already in evidence—the colored people had more or less recently been freed and were under the control and domination of white folks that came from outside?

A. I think that is correct, yes, sir.

Q. I will ask you whether that was one of the major occasions for limiting the membership of the Associ-

[fol. 100] ation as stated in this constitution to the white people of the county?

A. Yes, sir, it was. The negro vote had been controlled by—I will call them bad white people, and it was our purpose to separate that condition and by taking in the bad white people, I will call them, and separating them from the condition that existed to prevent them from controlling the negro vote and thereby controlling the county.

And we thought that by combining the white people and keeping the bad white people separated from the darkie, who was easily led, that we could obtain good government. And the exclusion of the negro was merely an accident of our purpose. The Association was not formed, not directed against the negro. It was directed against the bad white men who were leading astray the darkie.

Q. As a matter of fact, Judge Peareson, have any of our negro friends ever asked to be admitted to membership in the Jaybird Democratic Association prior to 1950?

A. Not to my knowledge. I have never heard of it.

Q. Had any of our colored friends asked earlier for admission to membership in the Jaybird Democratic Association, you would have heard of it, would you not?

A. I think so.

Q. Judge Peareson, I assume that it is true, is it not, that a few years after the organization of the Jaybird Democratic Association more of what we might call the good white people came into the county and some that you refer to as bad white people left the county?

[fol. 101] A. Yes, sir.

Q. So that the population changed?

A. Yes.

Q. Generally the number increased?

A. Yes.

Q. I will ask you, Judge Peareson, whether after the population got changing as mentioned, on up to the present minute, have we ever had any trouble between the white folks and our colored friends down there in Fort Bend County?

A. No, sir, not to my knowledge, and I think I would have known it if it had happened.

Q. You have been living right there in the county seat?

A. Yes, sir.

Q. Ever since 1869?

A. Yes, sir.

Q. As a matter of fact, don't the white people and our colored friends work at the same type of work and on the same jobs on the farms and the factories and such, there in the county?

A. Yes, sir.

Q. Judge, after the population changed as we mentioned a moment ago, what has been the main purpose and aim of the Association, from then on up till now?

A. It has always been to obtain good county government, good county officials who would administer their offices honestly and fairly and capably.

Q. Has the Association, the Jaybird Democratic Association, ever had a regulation or rule with reference to how many successive terms in office a men should hold?

A. Yes, sir.

[fol. 102] Q. I will ask you whether the question of one term or two terms or more than two terms has not really been the majority policy question back and forth between the Jaybird Democratic Association and its members and other folks not active members of the Association?

A. That is correct. That has been the bone of contention in the Association since the very first formation.

Q. As a matter of fact, I will ask you whether or not within the Association's own membership, within the Association itself, there has been some discussion and perhaps argument from time to time about limiting to two successive terms?

A. Yes, sir. There was quite a discussion about it at one time until it was determined. And even now there is a great number of the Association who want to do away with that provision of the constitution.

Q. You know Mr. I. G. Wirtz?

A. Yes, sir.

Q. He is a resident of Fort Bend County, is he?

A. Yes, sir.

Q. Did he ever apply for the endorsement of the Jaybird Democratic Association in a May Jaybird primary?

A. Well, now, there were two Mr. Wirtzes. Which one do you refer to?

Q. Mr. I. G. Wirtz.

A. They were both I. G. Do you mean Junior, the present one, or the other one?

Q. Well, let's talk about Junior, the present one, Judge. There is a lot of history and detail between the organization and now and we have to limit ourselves somewhere. [fol. 103] A. Yes.

Q. So suppose we not concern ourselves with things prior to 1938.

A. Yes. Well, not to my knowledge. He may have applied. Junior Wirtz may have applied at some time but if he did I have no knowledge of it.

Q. I will ask you whether or not Mr. I. G. Wirtz, the present Mr. Wirtz, is County Commissioner of precinct number 3 of the county?

A. Yes, sir, he is.

Q. Do you know how long he has been Commissioner?

A. Well, I cannot say the number of years but it is since the death of his father. It has been for several terms. Two or three or more terms.

Q. Several successive terms?

A. Several successive terms, yes, sir.

Q. Had he, during these last two or three terms, been endorsed by the Jaybird Democratic Association?

A. Well, I don't think so.

Q. I will ask you whether or not this paper, Plaintiff's Exhibit 4, with particular reference to the newspaper clipping on the left side, indicates that Mr. I. G. Wirtz is going to stand subject to the action of the Democratic primaries in July 1950?

A. Yes, that's what it says. "Subject to the action of the Democratic primary in July 1950."

Q. I will ask you whether or not Mr. I. G. Wirtz has applied for endorsement or for a place on the May 6, 1950, Jaybird Democratic Association ballot?

A. Well, I would judge from that announcement that he had not.

Q. It is in the stipulation that Mr. Wirtz is not and has not for some two or three terms been the nominee [fol. 104] or designee or selectee, anything you want to call him, of the Jaybird Democratic Association, but to the contrary he has defeated the man endorsed by the Association.

A. I think that is correct.

Q. Defeated him in the July Democratic Party primary. I will ask you whether or not Mr. Wirtz is considered a political and social outcast as indicated in the old original constitution or whether that part of the constitution is disregarded now?

A. That part of the constitution, you might say has never been enforced. Mr. Wirtz is a highly respected citizen of the Sugarland district and those who elect him in the Democratic primary regard him the same way.

Q. Judge, within your recollection, and you go all the way back, has there ever been any absentee voting in connection with the May or the June Jaybird Democratic Association primary?

A. I don't think so. I have never heard of it.

Q. Now, Judge, you, of course, have heard the stipulation and the testimony about the executive committee of the Jaybird Democratic Association canvassing the results of the membership voting on the May Jaybird primaries and declaring the results of the election or the balloting or the voting, or whatever you want to call it. I will ask you whether or not the executive committee of the Association or the Association itself participates any further in political matters after declaring the results of the May Jaybird Democratic Association primary or after declaring the results of the June Jaybird Association run-off?

A. No, we never—I have never heard of them taking any action whatever in reference to any candidate.

[fol. 105] Q. Is it true that the individual members at the July Democratic Party primary, held on the fourth Saturday in July as required under State law—I will ask you whether or not the individual members, at that Demo-

cratic Party primary, vote their own convictions and according to their own conscience or are they restricted, absolutely restricted to voting for a particular person?

A. They are free to vote for anybody they want to.

Q. Just because a man——

Mr. Townes, Jr.: I believe that is covered by stipulation, Your Honor. I won't go into that.

Q. I will ask you whether there is any actual official connection between the Jaybird Democratic Association of Fort Bend County, Texas, and the Democratic Party in the State of Texas?

A. There is none whatever.

Q. All right, sir. I assume quite naturally, since the—

Mr. Smith: We object to Mr. Townes' assumptions.

Mr. Townes, Jr.: I withdraw it, Your Honor. I didn't mean to be objectionable there. Excuse me.

Q. Is it true that folks who do vote in the Jaybird Democratic Association primary in May and in June also vote in the Democratic Party primary on the fourth Saturday in July if they care to vote in that election?

[fol. 106] Judge, I didn't understand the first part of your question there. I missed a word.

Q. Is it true that the folks who vote in the Jaybird Association primary in May or June also vote in the Democratic Party primary election in July, the fourth Saturday in July, if they care to do so?

A. Certainly.

Q. I will ask you whether the membership of the Jaybird Democratic Association is limited to white Democrats or whether white Republicans or members of other political factions may also be members? E. E. T./JES.

A. Republicans and white members of other political parties are free to join if they want to.

Mr. Townes, Jr.: I believe that's all, Your Honor, thank you.

Cross-examination.

By Mr. Smith:

Q. Judge Reareson, if I don't speak loud enough—

A. I'd be glad if you would come a little closer to me, sir, to save repeating the questions.

Q. I believe he asked you if members of other political parties could join. Now would you tell me just how anybody joins the Jaybird Association?

A. Well, if they pay their poll tax and believe in the principles of the Jaybird Association, why they are permitted to vote in these primaries and are considered members of the Association.

Q. Just automatically from the poll lists?

A. Yes.

Q. That is provided, however, that they are white voters?

[fol. 107] A. Yes.

Q. Now the facts are that most of the white citizens vote in the Jaybird primaries, do they not?

A. Well, I can't say that. I'd say that the greatest number of them do.

Q. The great majority of them do, don't they?

A. I might say the majority of them do.

Q. Yes, sir. Now it is true, is it not, that the election primary that the Jaybird Association holds is held just like the election primary that the Democratic Party holds upon a different day, isn't it?

A. Well, I cannot answer that directly but I think that they are very similar.

Q. Very similar?

A. Yes, sir.

Q. In fact, you used to use the convention system, didn't you?

A. Yes, sir.

Q. And then when the State passed the primary statutes you then organized your election procedure to parallel the primary statutes, didn't you?

A. I don't think that is quite correct, Mr. Smith. When our association was first formed we didn't have very many members, two or three hundred, and we would

have the convention system at which everybody who came could participate. As the members increased, why the convention body became too large and too unwieldy and on that account they went to the primary system.

Q. Well, in going to the primary system you used the same general method that is used by the Democratic primary and the general election, did you not?

A. To a large extent, yes, sir.

Q. And that includes the actual structural organization and the territorial manner where you have people [fol. 108] voting in the precincts just like any other election, don't you?

A. Well, the Jaybird Association has executive committeemen and they hold these primaries in each voting precinct, each voting precinct in the county.

Q. And you use ballot boxes, do you not?

A. Yes.

Q. Printed ballots?

A. Yes.

Q. And secret ballots?

A. Well, I don't know how secret it is.

Q. Well, I mean it is just as secret as a general election, isn't it?

A. I suppose so.

Q. And then you have returns made and those ballots counted?

A. To the executive committee of the Jaybird Association.

Q. That's what I mean, to your executive committee.

A. Yes, sir.

Q. And your executive committee canvasses the results?

A. Yes.

Q. And announces the result to the public?

A. Yes.

Q. And you allow——

A. You say "announces it to the public." I don't know. They declare the result.

Q. They declare the result?

A. I don't think there is any public announcement of any kind about it.

Q. And that is all very similar to what is done in the Democratic primary, isn't it?

A. I think so.

[fol. 109] Q. And what is done in the general election, is it not?

A. I think so.

Q. And the main difference is that you hold yours in May and June?

A. That is one of the differences.

Q. And that is one of the main differences, isn't it?

A. Yes.

Q. And you don't permit the negro citizens to vote in that election?

A. No, we don't.

Q. Now, one of the very purposes of your election is to have an election there where the negroes can't vote, isn't that right?

A. I wouldn't say that.

Q. Well, you don't permit them to vote, do you?

A. No, we don't permit them to vote but that is not the main purpose.

Q. That is one of your purposes, isn't it?

A. That is one of the purposes but that is an incidental purpose.

Q. And why do you have that purpose?

A. In order to get good county government.

Q. Is it the intention and ideal of your Association that you cannot have good government if you permit negro citizens to vote?

A. I think as a general rule that the negroes are not good voters, not capable of voting. Some of them are but a great body of them are not, in my judgment.

Q. And that is the basis of the policy of your Association?

A. Oh, that is part of it.

Q. And if the law says that they should vote you want an election held where they cannot vote, don't you?

[fol. 110] A. Well, I suppose I might say yes.

Q. All right. Now you were originally created for political purposes, weren't you, your Association?

A. To obtain good county government.

Q. And to engage in politics?

A. To that extent, yes.

Q. And you have engaged in politics ever since, haven't you?

A. We have engaged in the endorsement of men whom we thought capable of discharging the duties of the offices by endorsing them as candidates for that purpose.

Q. And that is for political offices in the county, is that true?

A. County offices, yes.

Q. All right. Now I believe you have been a member of the Association ever since it was organized?

A. Well, I——

Q. Will you tell the Court, please, Judge, is it not true that since the Jaybird Association was organized in 1899——

A. 1889.

Q. I mean 1889, excuse me, that the nominees or endorsees of that party for county-wide offices have been elected?

A. You make a distinction between the county-wide and the precinct?

Q. Yes.

A. I think that is correct.

Q. You think that is true. All right. Now is it not a fact that since 1889 in most all cases in the Democratic primary, the voter has only one name to vote on?

A. You mean in the county-wide?

Q. Yes.

[fol. 111] A. I think that is correct.

Q. And that name has been the nominee of the Jaybird party?

A. The endorsee of the Jaybird party.

Q. The endorsee, if you want to call it that. So that when for county-wide offices a person votes in the Democratic primary, he actually makes no choice, does he?

A. Well, he has the right to make a choice.

Q. I know, but the only name on there is the nominee of your organization.

A. He can put a name on there.

Q. He can write one in?

A. And he can take steps to put other candidates in if he wanted to.

Q. But the practical effect is that there is only one name on there since 1889?

A. Yes, I think that is correct.

Mr. Smith: That's all.

A. No, Mr. Smith, I am mistaken about that. In the election there were two candidates for County Judge. Mr. Baker, the endorsee of the Association, and Mr. Schultz who was already in office and was a candidate for the third successive term.

Q. One other question, since you brought that up——

The Court: Who was elected, Baker or Schultz?

A. Mr. Baker.

Q. Mr. Baker was the nominee of the Jaybird, wasn't he?

[Vol. 112] A. Yes, sir.

Q. Now it is a fact, isn't it, that your Association's policies now are directed toward holding an election in which the negro cannot vote?

A. Well, I wouldn't say that.

Q. You don't permit him to vote, do you?

A. I don't think that is the main purpose.

Q. But that is one of your purposes?

A. It is an incidental purpose.

Q. But it is one of your purposes?

A. It is one of the purposes.

Q. And I believe you stated the policy is that they are not qualified to vote in most cases?

A. That is my conclusion about it.

Mr. Smith: That's all.

Redirect examination.

By Mr. Townes, Jr.:

Q. Judge Peareson, I will ask you whether there is any other local organization in Fort Bend County which has ever existed or if it exists whether it has ever evinced a desire to have anyone on the July Democratic Party primary ballot?

A. Not to my knowledge.

Q. Have you ever known of any individual qualified to hold office who applied for a place on the primary ballot of the Democratic Party for the July election, and who paid the fee, who was ever refused a position on the Democratic July primary ballot?

A. I have—I don't think there has ever been. I have never heard of any such instance.

[fol. 113] Q. There is nothing to prevent our colored friends, by the use of their own organization, to have their own friends file an application to get on the primary ballot at the Democratic July primary?

A. Well, it is my judgment that if anyone applied to the Democratic executive committee and complied with the law, that his name would be placed on the Democratic ticket.

Q. Now it is stipulated that three of the plaintiffs belong to an organization, a national organization. Have you ever heard of that national organization ever endorsing a person or asking a person to get an application filed to get on the Democratic primary ballot in Fort Bend?

A. I have never heard of it.

Q. Now we still have, don't we, Judge, the write-in provision at the July Democratic Party primary?

A. Yes, sir.

Q. Have you ever heard of any organization of our colored friends who have sought to hold conventions in the county to endorse or to nominate candidates of their own to go on the general ballot?

A. I think that there is a Republican organization in the county. I think that they have put candidates for State offices on the Democratic primary, on the general election, but I don't think that any has ever been on for county office.

Q. But the door is wide open?

A. Yes, sir.

Q. For anybody who wants to, to comply with the law and get his name on the Democratic Party primary ballot in July of each election year; is that correct?

A. That is correct.

[fol. 114] Q. The door is still open for any county party without a State organization to hold a convention or a primary of its own on the fourth Saturday of July and certify its nominees to get on the general election ballot; is that correct?

A. I think that is correct.

Q. Judge Peareson, there have been some questions directed toward the success of the good folks that the Jaybird Democratic Association has endorsed and who have thereafter been nominated in the July Democratic primary and thereafter elected in the general election. What has been the experience of the Jaybird Association in its effort to endorse good folks for office?

A. Why, they have always sought to endorse capable and honest officials. And there is only one instance since the Association has been formed where its endorsee proved false to his trust. That is one man who was selected and endorsed by the Association and elected who did some acts that were not in accordance with the law.

Q. Other than that one instance, Judge, where a Jaybird Association endorsee was thereafter nominated in the July primary and elected in the November general election, has any other person so endorsed by the Association ever failed to give good, honest and efficient acquittance to his office?

A. I think not. I think the administration of affairs has been very well conducted all the way through with that single exception.

Q. Have we ever had, Judge, to your knowledge, any complaint from any of our colored friends about the administration or the performance of the duties of any elected official in Fort Bend County who had been earlier endorsed by the Association?

[fol. 115] A. Not prior to January 1, 1950.

Q. Have we had any complaint since January 1, 1950, by any of our colored friends as to the honest, efficient performance of the duties of any office by any man who had been earlier endorsed by the Association?

A. Well since January 1 there has been a colored man in my office who complained that the precinct in

which he lived was neglected by the County Commissioner in the way of roads and things of that kind.

Q. Do you recall what precinct that was?

A. I don't remember the number of it.

Q. That is precinct two, I believe.

A. Voting precinct two or Commissioner's precinct. I don't remember the number.

Q. The Commissioner's Court of the county is composed of folks elected in each of the four Commissioners' precincts?

A. Yes, sir.

Q. Has there been any more than the one instance where any of our colored friends have complained of the performance of the duties of any office in the county?

A. Not to my knowledge. Well, I believe there was another instance some time ago. A tenant on a piece of land I own complained that a bridge had not been repaired on a road to his place. That's all I recall now.

Q. Judge, that is one of those things that everybody who owns a piece of land off the hard surfaced road in Fort Bend county and every county and every precinct is always complaining about.

A. Well, I told one of the men who talked to me that everybody kicked about the Commissioner's Court.

[fol. 116] Q. That is not necessarily limited to Fort Bend County, is it Judge?

A. I don't think so, judging from the newspaper reports.

Mr. Townes, Jr.: I believe that's all.

Recross-examination.

By Mr. Smith:

Q. One other question, Judge. Have your elections always been held in May?

A. So far as I can remember, yes.

Q. So far as you can remember?

A. Yes, sir. I don't remember any other time.

Q. Now you are a lawyer, are you not, sir.

A. Yes, sir.

Q. And if your elections were held on the statutory primary dates you would be required by law to permit the negro to vote, would you not?

A. What is that?

Q. If your primary was held on the statutory day you would be required by law to let the negro vote, would you not?

Mr. Townes, Jr.: If your Honor please, we object to that. It calls for a conclusion and I don't know whether Judge Pearson happens to be familiar with the latest ruling of the Federal Judiciary on that point in the State of Texas. In the case of Perry versus Cyphers from the Eastern District, decided by Judge Davidson in September, decision to the contrary—E. E. T./JES.

[fol. 117] The Court: It sounds to me like a question of law.

Mr. Smith: Well, I will withdraw the question, Your Honor. That's all.

The Court: Stand aside. Call your next witness.

Mr. Townes, Jr.: Defendant rests; Your Honor.

The Court: Anything more from plaintiff?

Mr. Smith: If the Court please, as I understand, our stipulation is understood to be in evidence?

The Court: Yes, both of them.

Mr. Townsend, Jr.: Oh, yes, yes; both of them.

Mr. Smith: And as I understand it, you are making no contention about the qualifications of these plaintiffs to vote under the law?

Mr. Townes, Jr.: It is stipulated that they do own property, Counsel so advised, and I take that to be a fa . Similarly with reference to their ages and payment of poll tax for the current year. E. E. T./JES.

[fol. 118] Mr. Smith: I made that enquiry so there would be no contention as to the proof of those facts.

Mr. Townes, Jr.: I am not contending that at all.

Mr. Smith: We have nothing further, Your Honor.

The Court: This election takes place on May 6, does it?

Mr. Townes, Jr.: Yes, sir.

The Court: I believe I would like to hear you argue it and then you may offer your authorities in briefs.

Mr. Smith: The plaintiff is ready to proceed now, if the Court please.

The Court: Well, I will hear the argument now but your authorities you may give by brief this afternoon or tomorrow, of if you have them here you can give them to me.

Mr. Townes, Jr.: I don't have a formal brief. I have a short, incomplete memorandum. E.E.T./JES.

[fol. 119] The Court: If I should wait on you to prepare briefs why it would delay me too much to decide the case before the election. I understand you would like to have that done, so I think I will hear argument in the matter. About how long, now, do you want to argue?

Mr. Smith: Judge, I don't think too long.

Mr. Townes, Jr.: I don't think so, Judge.

The Court: Thirty minutes on the side?

Mr. Smith: I believe that would be enough. There may be some rejoinder for the plaintiff.

The Court: Well, I think we will take a recess of ten minutes and then we will have the argument.

(Short recess).

The Court: Be seated. You may open the argument for the plaintiff.

(Oral arguments were made by counsel for the plaintiff and counsel for the defendant.)

The Court: I will mark the case submitted and authorities by noon of April 25. Court will adjourn till nine-thirty in the morning.

(Court adjourned at 4:30 p. m.)

[fol. 120] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION

Civil Action No. 1135

JOHN TERRY, et al., Plaintiffs,

versus

A. J. ADAMS, et al., Defendants

OPINION OF THE COURT—Filed May 1, 1950

Allen, Smith, Neal & Lehmann, (J. Edwin Smith), of Houston, Texas; for Plaintiffs.

Townes & Townes, (E. E. Townes and Edgar E. Townes), and Clarence I. McFarlance, of Houston, Texas; D. R. Pearson and George Roane, of Richmond, Texas; for Defendants.

Kennerly, Chief Judge: This is a suit by John Terry, et al., citizens and residents of Fort Bend County, in this District and Division (for brevity called Plaintiffs), against A. J. Adams, et al., also residents and citizens of Fort Bend County (for brevity called Defendants). Defendants are sued individually and as representatives of the governing body of the Jaybird Democratic Association of Fort Bend County (for brevity called Association), commonly known, and described by Plaintiffs, as the Jaybird Party.

Such Association is a political organization or party. About April, May, or June of each election year, it holds a primary election or elections (called for brevity, Jaybird [fol. 121] Primary) to determine to what persons such Association will give its endorsement for County and Precinct Officers in Fort Bend County to be voted on in the Democratic Primaries to be held the following July and August. No negro is allowed to vote in such Jaybird Primary. Plaintiffs, who are negroes and qualified voters in such County, bring this suit for themselves and other similarly situated, seeking a Decree declaring that they are legally entitled to vote in such Jaybird Primary, for damages in the sum of Five Thousand Dollars for being deprived of such right, and enjoining Defendants from refusing to

allow them to vote. Particularly they pray that Defendants be enjoined from refusing to allow them to vote in the Jaybird Primaries of May 6, 1950, and June 3, 1950. Defendants have filed a Motion to Dismiss and have Answered, and this is a hearing on such Motion and a trial on the merits.

(a) Counsel for the parties have signed a Stipulation, which was offered by Defendants, which so well states the history and purpose of such Association that I quote it as follows:—

"The matters herein contained are not stipulated by Plaintiffs in the above cause within the sense that Plaintiffs agree thereto but it is agreed that the matters set forth in the following paragraphs may be read by Defendants on any trial or hearing of this cause, as Defendants statements with reference to said matters, the same as though each of said matters hereinafter set forth were introduced into evidence by testimony of witnesses testifying personally; and the Plaintiffs make no objection to the reading of the following paragraphs:

[fol. 122] In seeking to understand the Jaybird Democratic Association of Fort Bend County, Texas, it is necessary to keep in mind conditions throughout the South during the so-called Reconstruction Period, and particularly in those localities like Fort Bend County where the Negroes greatly outnumbered the whites. In the registration of voters from May to September 1867 there were admitted to registry 153 white voters and 1334 colored voters in the county. The State was placed under military rule; county officials were appointed and removed at will under military authority. When military control was discontinued, county and precinct offices were held over by the group theretofore in control, most of the white members of which had come into the county after the War. The colored people, only recently freed, were controlled by the white newcomers.

The result was a county government of dishonesty, corruption, graft and also of arrogance toward the native white citizens. The county officials were not interested in orderly honest government, the enforcement of law, the prevention of crime or its adequate punishment. The

native white people tried by personal persuasion and by appeal, both to the white members of the ruling organization and also to the Negroes, to bring about some betterment of official conditions and conduct, but to no avail.

Most, if not all, of the white people excluded from participation in voting or political affairs were Democrats. As time passed on and a greater percentage of the Democrats began to be permitted to vote, different groups among them sought to organize and support candidates for office, but without success.

[Fol. 123] Finally the condition became so intolerable that the Democrats, joined perhaps by a few good Republican citizens, decided to organize an association of white citizens to be known as the 'Jaybird Democratic Association of Fort Bend County', stating their object thus: 'The object of this association shall be to secure to the people of Fort Bend County economic and honest county government and the election of honest and faithful county officials.' 'Every bona fide white citizen of Fort Bend County shall be eligible to membership in this association.' This was in 1889.

Throughout the years the membership of the association has, by some method, ascertained whom the majority of its members desired to support for various county and precinct offices. For a period, it determined the preference of its members at mass meetings of the membership, before which mass meetings were placed the names of those who desired to seek office or whose friends desired to present and support them. Later the method was changed to a ballot voting system paralleling in general form and method the system set up by state law for political party government.

Those candidates selected as preferred by the membership of the Association by whatever method was followed were advised of their selection. The news of the result of voting in the Association was spread by word of mouth, newspapers and any other available news channels.

With the announcement of the selection of the candidates preferred by the membership of the Association, the organization's connection with the matter terminated."

[fol. 124] (b) Another Stipulation of Facts was signed and filed by Counsel for the parties. It is quite lengthy and it seems unnecessary to copy it herein. It is referred to and made a part hereof. Briefly stated, the facts as set forth in the Stipulation and shown by the evidence are as follows:—

(c) The four persons named as Defendants herein are officers of such Association. Such Association is governed by an Executive Committee of twenty-two persons, one from each voting precinct in the County.[1] Such officers are members of such Committee.

(d) The Jaybird Primary and/or Primaries are held on a date or dates fixed by such Committee of such Association each election year, to elect or select the persons who are to and will receive the endorsement of the Association for County and Precinct Offices in Fort Bend County, to be voted on at the Democratic Primary or [fol. 125] Primaries to be held in such County in July and August following. Such Jaybird Primary and/or Primaries are held and conducted and persons announce themselves as candidates and become candidates therein in substantially the same way as such Democratic Primaries are held and conducted under the Laws of Texas. Except that more than two consecutive terms for County and Precinct officers are prohibited by such Association and there is no pledge on the ballot at the Jaybird Primary. And further the Executive Committee of such Association does not certify the successful candidates. Such successful candidates must file

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[1] Paragraph IV of the Stipulation is as follows:

"The Jaybird Democratic Association of Fort Bend County, Texas, has an Executive Committee. To provide representation thereon to all portions of Fort Bend County, the Committee is composed of 22 persons, each selected by the members of the Association resident in the 22 respective voting precincts of the Association.

"Defendant A. J. Adams is President, George Lane is Vice-President and Mrs. Mattye Schulze is Secretary of the Association and said defendants, together with defendant R. M. Darst, are each members of the Executive Committee."

their own applications for a place on the ballot used in such Democratic Primaries. There are perhaps other minor exceptions.

(e) There is no other organization in Fort Bend County similar to such Association, and generally the persons endorsed in the Jaybird Primary are the only persons whose names appear on the ballot at the Democratic Primaries. And such persons are almost invariably elected or nominated at such Democratic Primaries and their names appear as Democratic Nominees on the official ballot at the General Election in November. The Democratic Nominees are almost invariably elected at such General Election. In other words, an endorsement at the Jaybird Primary generally means an election at the General Election in November. A majority of the white voters in Fort Bend County vote in the Jaybird Primaries, and generally abide by and support in the Democratic Primaries the persons endorsed by the Jaybird Primaries, although such Association has no way of requiring them to do so.

[fol. 126] (f) It is perfectly plain that the main and primary object of such Association has been from the beginning of its organization and still is to aid and enable the white voters of Fort Bend County to select and elect the County and Precinct officers of Fort Bend County and to deny the negro voters any voice or part therein.

1:—Defendants' Motion to Dismiss is not meritorious. It is clearly shown that the Jaybird Democratic Association is generally known as the Jaybird Party, by which name it is here sued. It is shown that the four Defendants herein are officers of such Association, and it is clear that the service of process on them brings them and such Association into Court under Rules 4(1) and 4(3) of the Federal Rules of Civil Procedure. It is also clear that this Court has jurisdiction of this case under Sections 31, 43 and 47, Title 8, U. S. C. A., and Sections 1331 and 1343, Title 28, Code of Judiciary and Judicial Procedure, effective September 1, 1948.

2:—Plaintiffs sue for themselves and for others similarly situated, claiming this to be a class suit. Plaintiffs also allege that Defendants are sued individually and as representatives of a class, "such class being the governing

body and officials of the Jaybird Party." They say that such class is so numerous as to make it impracticable to bring all of them before Court, etc. Clearly Plaintiffs may sue for themselves and for those similarly situated, and as stated Plaintiffs' pleadings and the process issued and served herein and Defendants' Answer bring Defendants and such Association into Court. But the evidence shows that the Governing Body of such Association is an Executive Committee of twenty-two members, Defendants herein [Tol. 127] being four of such twenty-two members. I do not think that the members of such Executive Committee other than the four defendants here sued are in Court. Only such Four Defendants and such Association are here.

3:—During the last quarter of a century, the question of the right of negroes under the Constitution of the United States to vote in political party elections or primaries such as the one in question here, has many times been before the Courts of Texas, both State and Federal. Also before the various Federal Courts of Appeals and the Supreme Court of the United States. Counsel for the parties cite many, but not all, the cases,[2] some of which are in point and some are not.

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[2] Baskin v. Brown, 174 Fed. (2d) 391. Chapman v. King, 154 Fed. (2d) 460. Cooper v. Cartwright, 195 Pac. (2d) 290. Davis v. Schnell, 81 Fed Supp. 872. Grovey v. Townsend, 295 U. S. 45, 55 Sup. Ct. 622. Hall v. Nagel, 154 Fed (2d) 931. Harrell v. Sullivan, 220 Ind. 108, 40 N. E. (2d) 115. Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872. Mitchell v. Wright, 154 Fed (2d) 924. Newberry v. United States, 256 U. S. 263, 41 S. Ct. 476. Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484. Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446. Rice v. Elmore, 165 Fed. (2d) 387. Seay v. Latham, 143 Tex. 1, 182 S. W. (2d) 251. Smith v. Allwright, 321 U. S. 649, 64 S Ct. 757. United States v. Classic, 313 U. S. 299, 61 S. Ct. 1030. Waples v. Marrast, 108 Tex. 5, 184 S. W. 180. Drake v. Executive Committee, 2 Fed. Supp. 486. White v. Executive Committee, 60 Fed. (2d) 973. State v. Norris, 33 S. W. (2d) 851. Perry v. Cyhers (Eastern District of Texas), Not Reported.

[fol. 128] 4:—Defendants contend that such Association is a self-governing voluntary association or club, and not a political party nor a creature or agency of the State of Texas. They also contend that there is no law of Texas regulating it, and that it has the legal and inherent right to prescribe who shall be its members and who shall vote in its primaries, and to exclude negroes from its membership and from voting in its primaries. Defendants cite and stand upon Drake v. Executive Committee (2 Fed. Supp. 486), decided by this Court in 1933. In that case, it was held that there was no law of Texas which regulated or controlled the Democratic Party of the City of Houston nor its Executive Committee in the matter of holding Primary Elections in Houston for nominating City Officers. And that such party in Houston and its Committee had the inherent right to say who should vote in such City Primaries.

But Counsel overlook some recent cases in which the Law is held to be to the contrary. In the State of South Carolina, after the decision of the Supreme Court in Smith v. Allwright, supra, the Legislature of that State repealed all primary election laws regulating political parties, yet in Rice v. Elmore, 165 Fed. (2d) 387, it was held that negroes were legally entitled to vote in the Democratic Primaries of South Carolina held and controlled by the Democratic Party. The Supreme Court refused Certiorari, 333 U. S. 875. See also Baskin v. Brown, 174 Fed. (2d) 391.

5:—But I do not agree with Defendants' contention that such Association is not a political party, nor that it is not regulated by the Laws of Texas, nor that it is not an agency of the State. Such Association is a political party and [fol. 129] comes clearly within the terms of Article 3163, Vernon's Texas Civil Statutes (1925) [3] which regulates it

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[3] Such Article is as follows:

"Any political party without a State organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day, which convention shall be composed of delegates from various election precincts in

and makes it an agency of the State. All that is said by this Court in White v. Executive Committee, 60 Fed. (2d) 973, which Defendants also cite, is applicable here. Such Association cannot avoid the effect of Article 3163 by holding its primaries on a date different from the date fixed by such Article, nor by different methods.

While in the case of Grovey v. Townsend, 295 U. S. 45, the Supreme Court of the United States held exactly the [fol. 130] opposite to what is held by this Court in White v. Executive Committee, the Supreme Court more recently in Smith v. Allwright, 321 U. S. 649, overruled Grovey v. Townsend, and in effect sustained the view set forth by this Court in White v. Executive Committee.

6:—My conclusion is:—

(a) That Plaintiffs are entitled to Judgment, declaring that Plaintiffs and those similarly situated and for whom Plaintiffs sue, are legally entitled to vote in the Jaybird Primary and/or Primaries held by such Association and specifically those to be held May 6, 1950, and June 3, 1950.

(b) Plaintiffs have waived their claim for damages.

(c) Injunction should not issue enjoining the four Defendants sued herein, to-wit, A. J. Adams, George Lane, Mrs. Mattye Schulze, and R. M. Darst, and the Jaybird Democratic Association of Fort Bend County, from refusing to allow Plaintiffs to vote in such Jaybird Primaries. The evidence as stated shows that the affairs of such Association are in the hands of an Executive Committee of twenty-two

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said county, elected therein at primary conventions held in such precincts between the hours of eight a. m. and ten p. m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election."

persons, and not in the hands of the four Defendants who are parties to this suit. They do not have the power to either allow or not allow Plaintiffs to vote. That power is in such Executive Committee.

Let appropriate Decree be drawn and presented in accordance herewith.

[fol. 131] The Clerk of the Court will file this Opinion, and it, together with the Stipulation mentioned, is adopted as Findings of Fact and Conclusions of Law.

T. M. Kennerly, Judge.

In United States District Court

Calendar Sheet Notation for Judgment

From Judge's calendar, May 1, 1950.

"5-1-50: Judgment for Plaintiffs, as per opinion filed. Clerk will notify counsel to prepare and present appropriate decree within five days. T. M. K."

In United States District Court

Final Judgment—Filed May 6, 1950

No. 9.

[Title omitted]

Be It Remembered that on the 24th day of April, A. D. 1950, came on to be heard the above styled and numbered cause wherein John Terry, Jesse Byers (Bias), R. E. Pink, [fol. 132] Jr., Charlie Roberts and Price Jackson, Jr., suing individually and for others similarly situated, are plaintiffs, and wherein A. J. Adams, George Lane, Mrs. Mattye Schulze and R. M. Darst, sued individually and as representatives of the governing body of the Jaybird Party, are defendants; when came the parties in person and by their attorneys of records, and with the agreement that defendants' Motion to Dismiss be taken with the case, all parties announced ready for trial. A jury not being requested all

matters of fact as well as of law were submitted to the Court. Thereupon the parties stated their pleadings and their theories of the case and defense, whereupon the Court heard evidence and received stipulations of fact. After the conclusion of all the proof the Court heard oral argument and took the case on briefs, carrying with the case defendants' Motion to Dismiss.

The Court finds that defendants' Motion to Dismiss is not meritorious.

The Court finds that the named plaintiffs may and do sue for themselves and for all others similarly situated; and that the process issued and served upon the above named individual defendants and said defendants' Answer herein bring the above named individual defendants and the Jaybird Democratic Association of Fort Bend County, Texas into Court; but that the governing body of such Association is an Executive Committee of twenty-two members and the members of such Executive Committee other than the four defendants here sued are not in Court; only such four defendants and such Association are here. [fol. 133] The Court finds that the Jaybird Democratic Association of Fort Bend County, Texas is a political party within the terms and provisions of Article 3163 of the Texas Revised Civil Statutes (1925), and is generally known as the Jaybird Party.

The Court finds that plaintiffs are entitled to judgment declaring that plaintiffs and those similarly situated and for whom plaintiffs sue are legally entitled to vote in the Jaybird Primary and/or Primaries held by the Jaybird Democratic Association of Fort Bend County, Texas and specifically those to be held May 6, 1950 and June 3, 1950.

The Court finds that the affairs of the Jaybird Democratic Association of Fort Bend County, Texas are in the hands of an Executive Committee of twenty-two persons, and not in the hands of the four defendants who are parties to this suit; that said four defendants do not have the power to either allow or not allow plaintiffs to vote, but that said power is in such Executive Committee, which is not before the Court; and that injunction should not issue enjoining the four defendants sued herein, to-wit, A. J. Adams, George Lane, Mrs. Mattye Schulze and R. M. Darst and

the Jaybird Democratic Association of Fort Bend County, Texas, from refusing to allow plaintiffs to vote in such Jaybird Primaries.

The Court further finds that by stipulation and in open Court any and all claims involved in this cause for or relating to money damages to plaintiffs and other persons, and against defendants and other persons, are expressly waived.

[fol. 134] It is therefore Ordered, Adjudged and Decreed that defendants' Motion to Dismiss be and same is hereby overruled.

It is Further Ordered, Adjudged, Decreed and Declared that the plaintiffs, John Terry, Jesse Byers (Bias), R. E. Pink, Jr., Charlie Roberts and Price Jackson, Jr., and all others similarly situated, and for whom plaintiffs sue are legally entitled to vote in the Jaybird Primary and/or Primaries held by the Jaybird Democratic Association of Fort Bend County, Texas, and specifically those Primaries to be held May 6, 1950 and June 3, 1950.

It is Further Ordered, Adjudged, Decreed and Declared that neither plaintiffs, nor any others similarly situated, and for whom plaintiffs sue, recover any money damages in this cause, no money damages being awarded to or for any person against any person.

It is Further Ordered, Adjudged, Decreed and Declared that injunction should not issue herein, but that the application of plaintiffs for themselves and all others similarly situated for an injunction be, and same is hereby, expressly refused.

It is Further Ordered, Adjudged, Decreed and Declared that further necessary or proper relief based upon this judgment and decree may be had pursuant to the provisions of 28 U. S. C. A., Section 2202.

It is Further Ordered, Adjudged and Decreed that all costs herein are adjudged against the defendant Jaybird Democratic Association of Fort Bend County, Texas.

[fol. 135] To which Judgment and Decree declaring plaintiffs and others similarly situated entitled to vote in the Jaybird Primary and/or Primaries, providing for further relief under 28 U. S. C. A., Section 2202 and awarding costs, defendants duly and timely excepted.

Done and entered at Houston, Harris County, Texas, this 5 day of May, A. D. 1950.

(S.) T. M. Kennerly, Judge Presiding.

Approved As To Form: (S.) J. Edwin Smith, Attorney for Plaintiffs. Townes & Townes, D. R. Pearson, Clarence I. McFarlane, George Roane, By (S.) Edgar E. Townes, Attorneys for Defendants.

In United States District Court

Defendants Motion for Rehearing—Filed May 16, 1950

Come now the defendants A. J. Adams, George Lane, Mrs. Mattye Schulze, R. M. Darst and Jaybird Democratic Association of Fort Bend County, Texas, and complaining of the judgment of the Court herein, entered on May 6, [fol. 136] 1950, respectfully move the Court for a rehearing and a new trial herein, and will show to the Court that said proceedings and judgment are erroneous in the following to-wit:

1

The Court erred in entering any judgment with reference to the Jaybird Democratic Association of Fort Bend County, Texas; and said judgment is erroneous in that, although it holds that the governing body of the Association is not before the Court, it nevertheless holds that the Association is before the Court by reason of the service upon two of its officers. The Association is admittedly not a corporation, nor any other character of legal entity independent of its entire membership; hence any judgment dealing with the Association without either all of its members or its governing body being before the Court is erroneous.

2

(a) The Court erred in holding that the Jaybird Democratic Association of Fort Bend County, Texas, is a political party, for the reason that such holding is wholly unsupported by the evidence and is plainly contrary to the undisputed evidence before the Court.

(b). The evidence shows that such Association and the members thereof originally had no intention or purpose of forming a political party, nor have they at any time since such organization had any such intention or purpose; and, [fol. 137] further, that the laws of the State of Texas do not permit the organization or operation of a political party in the way in which this Association was organized and has been conducted; in other words, the laws of the State of Texas do not recognize an organization such as this as a political party and do not extend to it the privileges, benefits and rights, and corresponding responsibilities and duties, applied by the laws of the State to political parties.

(c) Neither the Jaybird Democratic Association of Fort Bend County, Texas, nor its members have so acted as to bring it under the laws of the State of Texas relating to political parties or so as to constitute said Association a political party.

3

The Court erred in applying to the Jaybird Democratic Association of Fort Bend County, Texas, Article 3163 of the Revised Civil Statutes of the State of Texas. This erroneous application of this article of the statute was based:

(a) On the prior erroneous assumption that the Association is a political party.

(b) Article 3163 is a statute that is permissive only. It offers to political parties the option if they so desire to take advantage of its provisions and thereby only becomes subject to its regulations.

(c) The Association has not elected to take advantage of the permission or option offered by Article 3163 and consequently such article has not become applicable.

[fol. 138] (d) The decision of the Court is based first on the original erroneous presumption that the Association is a political party; the second erroneous presumption that Article 3163 therefore applies to the Association; the further erroneous presumption that regardless of whether the Association elected to proceed under Article 3163 and accept the benefits thereof, nevertheless the Court erroneously applies Article 3163 to the Association, and hence reaches

the further erroneous conclusion that said Association is a part of the official legal election machinery of the government of the State of Texas.

4

The judgment of the Court is erroneous in that it assumes, contrary to the fact, that some legal or enforceable result proceeds from the holding of the Association's primary on May 6 and a possible runoff on June 3, 1950, when in fact and in truth no binding or legally enforceable result comes from such primaries. If the Association is a political party and holds its primary on May 6, there is no legal way that such party can place its preference winners on the official ballot as provided by the laws of the State of Texas to be voted on in the November election. If it is a separate party, it certainly cannot put its nominees on the ticket of another separate party. If it is a separate party, the individual preference winners cannot put their names on the State ticket under any other separate party. If it is a separate party, and if it should apply for a place on the official ballot, it would be refused because it would be said not to have complied with the election laws of the State of [fol. 139] Texas. In other words, if the Association is a political party, it and its preference winners are complete outcasts so far as the election machinery and the election laws of the State of Texas are concerned. Hence the judgment of the Court is erroneous and void in that it compels the doing of a vain and useless thing of profit neither to the plaintiffs nor to the defendants nor to the Association.

5

The Court erred in its decision in that it deprives the members of the Association of their rights, privileges and immunities as citizens of the United States to select their own associates and the membership of their own organization which is not a public organization, nor vested with any public privileges, authority or obligation. The judgment constitutes an unlawful discrimination against the membership of the Association in violation of the rights guaranteed under the Constitution and laws of the United States.

Whereas, defendants A. J. Adams et al. and the Jaybird Democratic Association of Ft. Bend County, respectfully move the Court to grant them a new hearing, herein, and that upon final hearing judgment be entered denying plaintiffs any and all relief, and affirmatively holding that the above Association is not a political party, is not subject to Art. 3263 or any other provisions of the electoral statutes of Texas, and that neither plaintiff nor any other persons [fol. 140] in the same class with plaintiffs are entitled to participate in any of the activities of the above named Association, including its "primaries."

Respectfully submitted, Townes & Townes, D. R. Pearson, Clarence I. McFarlane, George Roane, By Edgar E. Townes.

A copy hereof has been served on J. Edwin Smith of the firm Allen, Smith, Neal & Lehmann, Attorneys for Plain-

Edgar E. Townes,

IN UNITED STATES DISTRICT COURT

CALENDAR NOTATION DENYING DEFENDANTS' MOTION FOR REHEARING—From Motion Calendar Sheet, May 31, 1950

"5-31-50: Defendants' Motion for Re-hearing is denied. Clerk will notify counsel to prepare and present appropriate Order within five days. T.M.K.".

[fol. 141] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEFENDANTS' MOTION FOR REHEARING AND NEW TRIAL—Filed June 3, 1950

Be It Remembered that on the 29th day of May, 1950, the above styled cause came on to be heard on defendants' motion for re-hearing and new trial. The Court heard oral argument from both parties, after which the motion was taken under advisement. After a full consideration of the motion the Court is of the opinion and finds that it is not well taken and should be denied.

It is therefore Ordered, Adjudged and Decreed that defendants' motion for rehearing and new trial be and is in all things denied and overruled.

To this action of the Court the defendants duly and timely excepted.

Done and entered at Houston, Harris County, Texas this the 2 day of June, A. D., 1950.

T. M. Kennerly, Judge Presiding.

Approved as to form: Allen, Smith, Neal & Lehmann, By J. Edwin Smith, Attorneys for Plaintiffs. Townes & Townes, By Edgar E. Townes, Attorneys for Defendants.

[fol. 142] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 31, 1950

No. 12

Notice is hereby given that the defendants, A. J. Adams, George Lane, Mrs. Mattye Schulze and R. M. Darst, sued in the above cause individually and as representatives of the governing body of the "Jaybird Party," and Jaybird Democratic Association of Fort Bend County, Texas, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from those portions of the judgment entered in the above entitled cause on May 6, 1950, to-wit:

"It is therefore Ordered, Adjudged and Decreed that defendants' Motion to Dismiss be and same is hereby overruled.

"It is Further Ordered, Adjudged, Decreed and Declared that the plaintiffs, John Terry, Jesse Byers (Bias), R. E. Pink, Jr., Chaplie Roberts and Price Jackson, Jr., and all others similarly situated, and for whom plaintiffs sue are [fol. 143] legally entitled to vote in the Jaybird Primary and/or Primaries held by the Jaybird Democratic Association of Fort Bend County, Texas, and specifically those Primaries to be held May 6, 1950 and June 3, 1950."

* * * * * * *

"It is Further Ordered, Adjudged, Decreed and Declared that further necessary or propef relief based upon this judgment and decree may be had pursuant to the provisions of 28 U. S. C. A., Section 2202.

"It is Further Ordered, Adjudged and Decreed that all costs herein are adjudged against the defendant Jaybird Democratic Association of Fort Bend County, Texas"; and from the conclusion in paragraph 6(a) in the opinion of the Trial Court herein dated May 1, 1950; and from the findings by the Court on which said portions of said judgment and said conclusion paragraph 6(a) are predicated; and from the May 31, 1950 ruling on defendants' Motion for New Trial herein.

Townes & Townes, George Roane, Clarence I. McFarlane, By Edgar E. Townes, Attorneys for Appellants.

[fol. 144] In United States District Court

Order Sending Up Original Exhibits—Filed June 30, 1950

On stipulation and Joint Motion of Appellants and Appellees,

It is Ordered that the following papers, to-wit:

Plaintiffs' Exhibit No. 1—Constituting a poster on behalf of McGill for Sheriff;

Plaintiffs' Exhibit No. 2—Poster on behalf of Zwahr for Sheriff;

Plaintiffs' Exhibit No. 3—Blotter on behalf of McGill for Sheriff;

Plaintiffs' Exhibit No. 4—A sheet consisting of cards and newspaper clippings;

Defendants' Exhibit No. 1—Constitution of the Jaybird Democratic Association of Fort Bend County, Texas;

being all of the original Exhibits produced in evidence in the trial of the above cause, be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans as a part of the record on appeal in said cause; and that said

Exhibits need not be copied or reproduced in the printed record on appeal.

(S.) T. M. Kennerly, District Judge.

[fols. 145-146] In United States District Court

Copy of Order Extending Time for Filing Transcript of Record—Forwarded to Court of Appeals, June 30, 1950

Pursuant to agreement of the parties and upon good cause shown, it is Ordered that the time within which the transcript of record shall be filed in the United States Circuit Court of Appeals for the Fifth Circuit shall be, and is hereby, extended to and including the 31st day of July, 1950.

(S.) T. M. Kennerly, District Judge.

Approved: Townes & Townes, C. I. McFarlane, George Roane, By Edgar E. Townes, Attorneys for A. J. Adams et al., Defendants and Appellants, Allen Smith, Neal & Lehmann, by J. Edwin Smith, Attorneys for John Terry et al., Plaintiffs and Appellees.

Duly sworn to by —— ——. Jurat omitted in printing.

[fol. 147] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 13, 1951

No. 13328

A. J. ADAMS, et al.,

versus

JOHN TERRY, et al.

On this day cause was called, and, after argument by Edgar E. Townes, Jr., Esq., and E. E. Townes, Esq., and Clarence L. McFarlane, Esq., for appellants, and J. Edwin Smith, Esq., for appellees, was submitted to the Court.

[fol. 148] OPINION OF THE COURT—Filed January 11, 1952

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13328

A. J. ADAMS, et al., Appellants,

versus

JOHN TERRY, et al., Appellees

Appeal from the United States District Court for the Southern District of Texas

(January 11, 1952)

Before Hutcheson, Chief Judge, and Holmes, and Strum, Circuit Judges

HUTCHESON, Chief Judge:

Brought March 16, 1950, as a class action against defendants, sued individually and as members of the Jaybird Party, the suit was for a declaratory judgment as to the

rights of plaintiffs and their class to vote in primaries of the Jaybird Party, scheduled for May 6, and June 3, 1950, and for an injunction protecting those rights.

[fol. 149] Grounded on the claim, put forward and sustained in *Perry v. Cyphers* (5 Cir.), 186 Fed(2) 608, as to the defendants in that suit: that the defendants in this suit are representatives of a political party operating under, and controlled by, Art. 3163 Rev. Civil Statutes of Texas; that they exclude negroes from participating in the primaries conducted by them in the name of the Jaybird Party; and that, in doing so, they acted under color of state law; the case is in sharp focus.

Specifically stated, the claim in this suit was: (1) that the defendants were officers of a political party in Fort Bend County, Texas, commonly known as the Jaybird Party, having no state organization and nominating for county and precinct offices only; (2) that the Texas statutes have made the primaries of political parties, without a state organization and which nominate for county and precinct offices only, an integral part of the procedure of choice of precinct and county officials and representatives; (3) that endorsement in the primaries of the Jaybird Party in effect controls the choice of precinct and county officials by determining, first, the nomination in the primaries of the Democratic party for precinct and county officials, and, next, the election of these nominees in the general election; (4) that for many years the officers of the Jaybird party have, on the sole distinction of race or color denied the plaintiffs and others like situated the right and privilege of voting in its primaries; (5) that the official governing body of the Jaybird party announced in February, 1950, that members of the negro race would not be allowed to vote in the forthcoming primaries scheduled for May 6, and June 3; and (6) that this action was in violation of [fol. 150] the Constitution of the United States, Amendments Fourteen, Sec. 1, and Fifteen, Sec. 1, and of the provisions of the Elective Franchise Statute, 8 U. S. C. A., Sec. 31, and the Civil Rights Statute, 8 U. S. C. A., Secs. 43 and 47.

Defendants moved to dismiss on the grounds: (1) that they are not representatives of, they do not know, and have never had anything to do with, the Jaybird party;

(2) that they are not officers of a political party existing in Fort Bend County, without a state organization and which nominates for county and precinct offices only, as described and dealt with in Art. 3163 of the Revised Civil Statutes of Texas; and (3) that they have never operated nor attempted to operate under, or in compliance or in liaison with, Art. 3163 or any other state law governing elections.

For answer they alleged, and it was later in effect stipulated: (1) that they are officers of a private unincorporated organization, the Jaybird Democratic Association of Fort Bend County; (2) that it has never become in anywise related to or connected with electoral Machinery of the State as a process or part thereof, and it is not, and never has been, an integral part of that machinery; (4) that the persons endorsed by it in its preference primaries are not in any way certified to the Democratic Primary, nor do they run in that primary under any symbol or nomenclature or with any status except that of an individual; (5) that it does from time to time, by the use of a straw ballot having no official meaning or legal sanction, take the opinion of the membership of the asso- [fol. 151] ciation, the qualified white voters of county and precincts as to whom they should endorse; and (6) that it does request such persons as may be endorsed in the balloting, to individually apply for positions on the ballot in the official primary, the July primary of the Democratic party, but it has no power to compel them to comply with the request, and they make their application and appearance on the Democratic primary ballot after complying with all of the requirements of the Democratic party for a place thereon as individuals under no symbol or nomenclature whatever indicating that they are members of, or endorsed by, the association.

The case coming to trial, and there being no dispute as to the facts, plaintiffs put in evidence a lengthy and complete stipulation as to the facts and also put two of the defendants on the stand not to contradict, but to confirm, the matters stipulated.

Plaintiffs having rested, the defendants offered one witness, not to contradict, but to confirm and elaborate upon, the stipulation offered by plaintiffs, and a stipulation of-

fered by defendants. This latter contained a statement: (1) as to the conditions in the county which brought about the organization in 1889 of the association; (2) that for a period it had determined the preference of its members at mass meetings, and "later the method was changed to a ballot voting system paralleling in general form and intent the system set up by state law for political party government"; and (3) that, with the announcement of the selection of the candidate preferred by the association, its connection ceased, and the news of the results of the voting was spread by word of mouth, newspapers, etc.

[fol. 152] The district judge found: that the main and primary purpose of the organization is to enable the white voters of Fort Bend County to select and elect the county and precinct officers of Fort Bend County and to deny the negro voters any voice or part therein; and that, though the association does not conform to a single requirement of Art. 3163, it is a political party coming clearly within the terms of that article. Of the opinion that the case was ruled by the South Carolina cases, *Rice v. Elmore*, 165 F.(2) 387 and *Baskin v. Brown*, 174 F(2) 391, and by his opinion in *White v. County Democratic Executive Committee*, 60 Fed(2) 973, he gave a judgment for plaintiffs, declaring that they "and all others similarly situated are legally entitled to vote in the Jaybird primary or primaries held by the Jaybird Democratic Association of Fort Bend County, and specifically those primaries to be held" May 6, 1950, and June 3, 1950. Because, however, plaintiffs had waived their claims for damages and because he thought that, for the reasons given in his opinion, the defendants were not in a position to control the association, no judgment either for damages or an injunction was ordered.

Defendants are here insisting that in so ruling and adjudging, the district court erred, in that he mistakenly applied to the undisputed facts of this case, principles applied in decisions dealing with entirely different facts and situations. They point out that the election dealt with here is not one of the steps in "a two step election machinery for the state",[1] as was the case in the cases

[1] Rice v. Elmore, 165 Fed(2) at 392.

the district judge relied on, and, as was the case in *Perry v. Cyphers, supra,* where nominations for county and for [fol. 153] precinct officers were made by a party operating under, and controlled by, Art. 3163. So pointing, appellants insist that the decision in this case is a complete departure from, indeed is in direct contravention of, not only the above cited cases, but of the settled course of decision culminating in *Collins v. Hardyman,* 341 U. S., 651, that it was not against individual, but against state, action that the Fourteenth and Fifteenth Amendments and 8 U. S. C. A., Sec. 43 and 47 were, and are, directed.

We agree with defendants, and shall briefly set forth our reasons for doing so.

The opinion[2] of the district judge sets out in full the history and purpose of the association, as it is contained in the stipulation offered by defendants, and undertakes, though with undue meagerness and with the result of not making clear what the real facts as stipulated are, to abstract the lengthy stipulation of facts offered by plaintiff. Because this is so, because the facts are undisputed, and because the question at issue is one not of fact but of law, we shall not, except by quoting from the stipulation the controlling facts[3] as to what the association does and

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[2] Terry v. Adams, 90 Fed. Supp. 595.

[3] "By the phrase 'official primary' as used in this stipulation, is meant the Democratic Party primary elections held the fourth Saturday in July and the fourth Saturday in August, as provided in Article 3102 Texas R. C. S."

"The Jaybird Democratic Association primaries are held in May and June, and are now scheduled for May 6, and June 3, 1950."

"There is no political organization in Fort Bend County, Texas, by the official name or designation 'Jaybird Party'. At all times since 1889, however, there has been and still is, an organization in Fort Bend County, Texas, by the name of 'Jaybird Democratic Association of Fort Bend County, Texas'. Said Association, however, has not since 1938, and it does not: (a) Have a State organization; (b) Follow or attempt to comply with any of the provisions of Article 3163 of the Revised Statutes of Texas, or of any other statutes of the State of Texas with reference to pri-

[fol. 154] does not do and briefly summarizing others which are important, further set out the contents of the lengthy stipulation generally or in detail.

Because the principle controlling this case has already been clearly stated and correctly applied in the cases cited by the district judge and in our case of *Perry v. Cyphers*, [fol. 155] *supra*, it will not be necessary for us to extend this opinion by an elaborate discussion of that principle. It will be sufficient, by brief quotations from some of those cases and by a precise focusing on the facts, which differentiate this case from those, to show that in the decision below a clear and good principle has been misapplied and thereby run into the ground.

This principle is that no form of device, through the use of which negroes are, because they are negroes, prevented from voting *at an election, which is in effect a part and parcel of state election machinery*, may be effectively employed. All such forms will be penetrated and the illegal

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mary elections or general elections; (c) Hold any convention of 'primary election' on the legal primary election day, to-wit: The fourth Saturday in July or the fourth Saturday in August, of any year; (d) Hold any primary convention in any precinct on the Saturday preceding a legal primary election day; (e) By the chairman of a county committee, or otherwise, certify to the County Clerk of Fort Bend County, Texas, or to the County Judge thereof, or to any official committee or other representative of the Democratic or Republican party, any nominations or indorsements made by the Association; (f) Have, or cause to be, printed in a separate column headed by the Association name any nominations of any official ballot used, or for use in, a primary or general election held on a legal primary election day or general election day; (nor does the name, Jaybird Democratic Association of Fort Bend County, Texas, or any part of indication thereof, appear on any ballot in any election other than the primaries, or other special voting occasions, held by the Association itself and alone); (g) Make, or cause to be made, a written application to the County Julge for such printing, signed and sworn to by 3 percent of the entire vote east in Fort Bend County at the last preceding general election."

devices will be exposed and striken down. In *Rice v. Elmore*, at page 392, the controlling facts are precisely stated thus:

> "The use of the Democratic primary in connection with the general-election in South Carolina provides, as has been stated, a two step election machinery for that state; and the denial to the Negro of the right to participate in the primary denies him all effective voice in the government of his country."

Early in each year in which elections are to be held the Executive Committee of the Jaybird Democratic Association meets and sets the dates (a) by which persons who desire their names on the Jaybird Democratic Association primary ballot must file applications therefor; (b) the date by which the fees to be paid by each such person toward the expense of the Jaybird Democratic Association primary shall be paid; such fees being usually fixed at between 2 and 3 percent of the salaries of the offices aspired to; (c) the date on which the Jaybird Democratic Association primary shall be held in May; and (d) the date on which the Jaybird Democratic Association run-off primary, if required, will be held in June.

The ballots from each voting precinct are canvassed by the Executive Committee which declares the results of such canvass and announces the identity of the persons who have received the indorsement. No officer nor committee of such association certified the result of the vote or any nominations of the association to the County Clerk of Fort Bend County, to the Democratic County Executive Committee, nor to the committee or official of any party of a statewide organization.

No person who receives the indorsement of the Jaybird association is compelled to run in the Democratic primary, but if he wishes to run he may do so. But he must himself file his application with the Executive chairman or committee of the Democratic party, must independently comply with the requirements of the Democratic party or the law, and must himself pay the fee as provided by law. Neither the Jaybird Association nor anybody for it applies to the Democratic party for the placing of its nominee on the ballot for the Democratic party election.

In *Baskin v. Brown, supra,* which follows the principle applied in *Rice's* case and quotes freely from it, Judge Parker, who had for the court written the opinion in *Rice's* case, summing up the *Rice* decision, said at page 393:

> "The gist of that decision was that primaries, under modern conditions, are a part of the election machinery of the state, and that a state cannot, by allowing a political party to take over this part of its election [fol. 156] machinery, avoid the provisions of the Constitution forbidding racial discrimination in elections, and thus deny to a part of the electorate, because of race or color, any effective voice in the government of the state."

Further, at page 394, in canvassing and rejecting the argument made there, that the Democratic party in South Carolina does not exercise state power but is a mere voluntary organization of citizens to which the constitutional limitations upon the power of the state have no application, Judge Parker, for the court, makes an illuminating contribution to the discussion and application of the principle:

> *"This may be true of a political party which does not undertake the performance of state functions, but not of one which is allowed by the state to take over and operate a vital part of its electoral machinery. When the organization of the party and the primary which it conducts are so used in connection with the general election that the latter merely registers and gives effect to the discrimination which they have sanctioned, such discrimination must be enjoined to safeguard the election itself from giving effect to that which the Constitution forbids.* Courts of equity are neither blind nor impotent. They exercise their injunctive power to strike directly at the source of the evil which they are seeking to prevent. The evil here is racial discrimination which bars Negro voters from any effective participation in the government of their state; *and when it appears that this discrimination is practiced through rules of a party which controls the primary elections,*

[fol. 157] *these must be enjoined, just as any other practice which threatens to corrupt elections or divert them from their constitutional purpose.*" (Emphasis supplied.)

In *Perry's* case, *supra*, the party was an integral part of the state election machinery. It operated precisely under, and in accordance with, Art. 3163 of the Revised Civil Statutes. As a matter of course, we there determined, in conformity with the controlling principle and with prior decisions on the subject, that the action of the party was state action and that negroes could not be deprived of participation in its elections.

Here, as a comparison, point by point, of the provisions of Article 3163,[4] with the stipulated facts set out in note 3, *supra*, will show, the Jaybird Democratic Association does not in any way or manner operate as a part or parcel of, or in liaison with, state political or elective machinery. In short, it is not a part of the two step arrangement, the Democratic primary and the general election; so as to make its action state action.

It is true that in the main, though there have been, and

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[4] "Art. 3163. Parties without State organization.

"Any political party without a State organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day, which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a. m. and ten p. m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election."

are, exceptions, the indorsement of the Jaybird primary [fol. 158] does usually mean that the winner of that indorsement will have no opposition in the Democratic primary. *This is not, however, because of any provision of state law or any agreement or arrangement with the Democratic party having the effect of state action. It is because, and only because there is a consensus of opinion in the county that the indorsement should be regarded as decisive.*

No claim is made, or could be made, that anybody, including any of the plaintiffs, is misled, by collusion of state authorities, or of managers or officers of the State Democratic Party, with these defendants, into believing that the advisory vote taken by the white voters of Fort Bend County has any legal or binding effect whatever. Indeed, while the form and pattern of an election has been followed, nothing more in substance has occurred here than if, in precinct by precinct, neighborhood by neighborhood, or by straw ballot in a newspaper, the white voters of Fort Bend County had indicated their choice for the offices to be filled and had made that choice publicly known.

If, upon the overall facts, the question for our decision were whether, from the standpoint of good neighborliness and good government in the changed and changing climate of opinion in this state, there is any point in clinging, under the greatly different conditions[5] now prevailing, [fol. 159] to this outworn and outmoded shadow boxing, these mock elections, we should be constrained to declare that it seems to us that the white voters of Fort Bend

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[5] Compare the changed conditions and climate of opinion now prevailing, of which we may take judicial notice, with the greatly different conditions and events which existed at the time of the formation of the association, as they are set out in Terry v. Adams, 90 Fed. Supp. at 597, and these excerpts from the testimony of Judge D. R. Pearson, an original member of the Association:

"In 1888, there were two tickets placed in the field. One was called the Woodpecker ticket, which consisted of the white people who came from outside and who were controlling the negro vote, and the other was called

County are vainly holding to the husks of a respected tradition long after the ripe grain has fallen.

But this is not our question. What and all that is for decision here is whether the complained of action is action under color of state law, depriving plaintiffs of rights accorded them by the invoked constitutional and statutory provisions. To answer that question in the affirmative and to hold that it is, would be, we think, to go directly contrary to the long line of cases beginning with the Civil Rights cases, 109 U. S. 3, and ending with *Collins v. Hardyman, supra.* In that case it was said:

> "While we have not been in agreement as to the interpretation and application of some of the post-Civil War legislation, the Court recently unanimously declared, through the Chief Justice:
>
> 'Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the [fol. 160] action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amend-

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the Jaybird Party, which consisted of the white people of the county. * * *

There were assassinations, and fights resulting in killings and great disorders. * * *

One of the major occasions for limiting the membership of the Association to white people was that the negro vote had been controlled by—I will call them bad white people * * * and we thought that by combining the white people and keeping the bad white people separated from the darkies who were easily led, that we could obtain good government and the exclusion of the negro was merely an accident of our purpose. *The association was not formed, was not directed against the negro, it was directed against the bad white men who were leading astray the darkies.* * * * *As a matter of fact, prior to 1950, none of our negro friends ever asked to be admitted to membership in the Democratic Jaybird Association.*" (Emphasis supplied.)

ment erects no shield against merely private conduct, however discriminatory or wrongful.'"

The judgment is Reversed and the cause is Remanded for further and not inconsistent proceedings.

[fol. 161] JUDGMENT

Extract from the Minutes of January 11, 1952

No. 13328

A. J. ADAMS, ET AL.,

versus

JOHN TERRY, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered and adjudged that the appellees, John Terry and others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 169] ORDER DENYING REHEARING

Extract from the Minutes of February 20, 1952

No. 13328

A. J. ADAMS, ET AL.,

versus

JOHN TERRY, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 170] REQUEST FOR PREPARATION OF TRANSCRIPT FOR APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT—Filed February 25, 1952

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AT NEW ORLEANS

No. 13,328

A. J. ADAMS, ET AL., Appellants,

v.

JOHN TERRY, ET AL., Appellees

To the Honorable Oakley F. Dodd, Clerk:

SIR:

Please prepare a transcript for application for Certiorari to the Supreme Court of the United States in the above styled and numbered cause, including therein the following:

(1) The printed Record in the Court of Appeals,
(2) Minute Entry showing argument and submission of the cause,
(3) Opinion of the Court,
(4) The judgment of the Court,
(5) Appellees' Motion for Re-hearing,

(6) Order denying the Petition for Re-hearing,
(7) This designation,
(8) Clerk's Certificate.

Respectfully requested, J. Edwin Smith, Attorney for Appellees.

[fol. 171] CERTIFICATE

A true copy of this designation was on this, the 22 day of February, 1952 properly mailed to the attorneys of record for the Appellants.

J. Edwin Smith.

[fol. 172] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 17, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
MAY 6 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. [redacted] 52

JOHN TERRY, ET AL.,

Petitioners,

v.

A. J. ADAMS, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

IRA J. ALLEN,
J. EDWIN SMITH,
GEORGE E. CIRE,
1313-1114 Texas Ave., Bldg.,
Houston 2, Texas,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 754

JOHN TERRY, ET AL.,

Petitioners,

v.

A. J. ADAMS, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Come now John Terry, Jessie Byers, R. E. Pink Jr., Charlie Roberts, and Price Jackson, Petitioners, and pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on January 11, 1952 (R. 158), and the order denying rehearing entered on February 20, 1952 (R. 166).

Opinions Below

The opinion of the district court granting the Petitioners' right to vote in the primaries (R. 120-131) is reported in 90 Fed. Supp. 595. The opinion of the Court of Appeals (R.

147-158) denying Petitioners the right to vote in the primaries is reported in 193 Fed. (2d) 600.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254 (1). The judgment of the Court of Appeals was entered on January 11, 1952. A petition for rehearing was filed on January 28, 1952, and was denied on February 20, 1952. This Petition is presented May 6, 1952.

Questions Presented

I

Whether Petitioners, members of the Negro race, have a constitutional right to vote in the primary elections of a political party that has no statewide organization, but which nominates for county and precinct offices only.

II

Whether under the Constitution of the United States a political party without statewide organization, but which nominates for county and precinct offices only can deny to citizens of the Negro race the right to vote in its primary elections on the sole ground of race or color.

III

Whether a political party by the device of holding its primary elections in advance of the statutory dates can avoid the holding by this Court in *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757, and exclude Negroes from the ballot box.

IV

Whether a political party by the device of violating the statute regulating county wide political parties can attain

an immunity from the restraints of the Fourteenth and Fifteenth Amendments that would be denied it were it to comply with the statutory regulations.

Statutes Involved

The State of Texas has by statute regulated political parties with only county and precinct organization. *Tex. Rev. Civ. Stat.* (1925), Art. 3163. This statute is printed in Appendix A, p. 16, infra.

Petitioners rely in part upon 8 U. S. C. A., 31; this statute is printed in Appendix B, p. 16, infra.

Statement of the Case

Petitioners are members of the Negro Race and are qualified voters (R. 53).

The Jaybird Party of Ft. Bend County, Texas, officially named the Jaybird Democratic Association of Ft. Bend County, Texas, was organized in 1889 (R. 96). Since that date it has nominated for County and Precinct offices only (R. 110). Respondents are officials of this party (R. 36).

Since 1889 the qualified voters of the County, with the exception of Negroes, have participated in its conventions and primaries (R. 65-66; 106).

Since 1889 the nominees of this party have been the only names placed on the Democratic Primary ballots for county offices (R. 68-69, 110).

Since 1889 the nominees of this party have been the only names on the general election ballot for county offices (R. 88, 110).

Since 1889, the nominees of this party for county offices have been elected to such offices (R. 68-69, 88, 110-111).

The purpose of the organization, as stated by Mr. A. J. Adams, its president, and Mr. R. M. Darst, an executive committeeman, is to elect the choice of the Association to

public office and have them run the government of the county (R. 67, 91).

All white males and females of Ft. Bend County, Texas, who are qualified voters under the laws of the State of Texas and who have paid, or are exempt from paying, the poll tax are automatically members of the Association (R. 39, 65, 91, 106). The voting list of the county, with the exception of negroes, comprises the membership of the Association (R. 65, 106). When the elections are held the official poll tax lists are used, they being obtained free of charge from the office of the County Clerk (R. 66).

Organization of the Association parallels that of the Democratic Party in the precincts and county (R. 35, 38, 63, 108); by popular vote it chooses precinct judges for the twenty-two voting precincts of the county, who comprise the County Executive Committee (R. 35-36, 63, 108).

Elections of the Association are called "primaries", a first primary and a run-off primary (R. 38). Candidates desiring to run for county or precinct offices make application to the Executive Committee and pay a filing fee set by the Executive Committee which amounts to between 2% and 3% of the salary paid for the offices to which the candidates aspire (R. 36-37).

Candidates in the primaries conduct public campaigns for nomination, putting up posters, announcing that they are running for public office, distributing campaign literature, and publicizing themselves in newspapers of the county (R. 70-73).

Voting in the primaries is by printed ballots and in the respective voting precincts of the county, paralleling other elections (R. 38, 108). The voting is secret as in any other election (R. 108).

The votes are counted in the precincts and then certified to the Executive Committee, which canvasses the returns and declares the result (R. 40, 108).

On this evidence, the trial court found the Association to be a county-wide political party within the terms of *Tex. Rev. Civ. Stat.*, (1925), Art. 3163 (R. 129).

The Jaybird Primaries are held in May and June of election years in advance of the statutory dates for primaries in July and August (R. 108-109).

As to the purpose of not holding the primaries at the statutory times, Mr. D. R. Pearson, a founder of the Association, testified as follows:

> "Q. And if the law says they (negroes) should vote you want an election held where they cannot vote, don't you?
>
> A. Well, I suppose I might say yes." (R. 109-110).

In a fuller manner Mr. A. J. Adams, President of the Association, testified to the same facts as follows:

> "Q. *And then one of the purposes of your organization is for the specific purpose of excluding negroes from voting, isn't it?*
>
> A. *Yes.*
>
> Q. *And that is your policy?*
>
> A. *Yes.*
>
> Q. *I will ask you, that is the reason you hold your election in May rather than in June or July, isn't it?*
>
> A. *Yes.*" (R. 85).

As to the object and purpose of the Association, the trial court made the following clear and explicit finding:

> "It is perfectly plain that the main and primary object of such Association has been from the beginning of its organization and still is to aid and enable the white voters of Fort Bend County to select and elect the County and Precinct officers of Fort Bend County and to deny the negro any voice or part therein." (R. 126).

On the above facts and fact findings the trial court entered judgment giving Petitioners the constitutional

right to vote in the Jaybird Primaries (R. 131-135). The Court of Appeals did not overturn the findings of fact but held that the law applicable to the facts authorized the exclusion of the Petitioners from the primaries on the sole ground of race or color (R. 151).

Specification of Errors to Be Urged

It is urged that the Honorable Court of Appeals erred in the following particulars:

I

In holding that the Petitioners can be excluded from the Jaybird Primaries on the sole ground of race or color.

II

In holding that the Jaybird Primaries are not state action.

III

In failing to hold that the rule of *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757, entitles the Petitioners to vote in the Jaybird Primaries.

IV

In holding that the Fourteenth and Fifteenth Amendments to the Constitution of the United States do not guarantee to Petitioners the right to vote in the Jaybird Primaries.

V

In holding that the Jaybird Party can avoid the mandates of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and the rule of *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757, by the device of holding its primaries a few days in advance of the dates set by the state statute.

VI

In holding in direct conflict with the decisions by the Court of Appeals for the Fourth Circuit in *Rice* v. *Elmore* (4th Cir.) 65 Fed. (2d) 387 (Cert. Den.), and *Baskin* v. *Brown*, (4th Cir.) 174 Fed. (2d) 391.

Argument and Authorities Supporting the Granting of the Writ

I

This Petition presents for consideration another device for excluding members of the Negro race from the ballot box. It functions as follows:

(1) Hold a public primary election and run-off primary election a few weeks in advance of the statutory dates for primaries.

(2) Have the only contest that really counts in these advance primaries.

(3) Exclude Negroes from voting in these advance primaries.

(4) Put the nominees of these advance primaries on the ballots in the Democratic Primaries *without opposition.*

(5) Put the same nominees on the general election ballot *without opposition.*

Thus the Jaybird Primaries predetermine and effectively control the choice in the Democratic Primaries and in the general election. Thus Negroes are denied a voice in the only election that counts. Thus Negroes are denied a voice in the government of their county. This device is but a means of circumventing the rule of *Smith* v. *Allwright*, 321 U. S. 648, 64 S. Ct. 757 and the mandates of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The record demonstrates almost conclusively that the Jaybird Party is in actual fact the local Democratic Party. We respectfully advance the suggestion that the Court of Appeals has failed to give sufficient weight to the abundant evidence with which the record is replete on this point: For sixty years the local Democratic organization has submitted to the decisions and desires of the Jaybird Association, for it has accepted the latter's choice without contest, thereby sanctioning and participating in the discrimination practiced. Under most all rules of evidence a sixty-year course of acquiescence would mean agreement to, cooperation with, and participation in the activity.

This sixty-year submission in a heretofore ardently Democratic state identifies the Jaybird Association as the local Democratic Party organization. Where else in this state for the past sixty years has this turbulent party been so supine? Its local conspicuous quiescence is not only suspicious, it supports and compels the conclusion that it is, by the device of the Jaybird Primary, practicing discrimination forbidden by the Constitution and this Court.

We strongly urge upon this Court the significance of the decision by the Court of Appeals, and the import of legal sanction of the Jaybird Primary as setting a pattern for further and more extensive disenfranchisement of Negro citizens.

Every conceivable device, including this one, has been used in an effort to circumvent the Constitution and to deny to the Negro race an effective voice in elections. See: *Guinn* v. *United States*, 238 U. S. 347, 35 S. Ct. 926 (The "grandfather clause"); *Nixon* v. *Herndon*, 273 U. S. 536, 47 S. Ct. 446 (Statutory exclusion of Negroes from primaries); *Nixon* v. *Condon*, 286 U. S. 73, 52 S. Ct. 484 (Delegation of control of party membership to the State Executive Committee of a party); *Lane* v. *Wilson*, 307 U. S. 268,

59 S. Ct. 872 (Complicated registration procedures); *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757 (Delegation of full control of membership to political parties); *Baskin* v. *Brown*, 174 Fed. (2d) 391 (Membership in political party clubs); *Rice* v. *Elmore*, 165 Fed. (2d) 387 (repeal of all statutory regulations); *Davis* v. *Schnell*, 81 Fed. Supp. 872 ("Understanding and explaining" the Constitution—the "Boswell Amendment"); *Perry* v. *Cyphers*, 186 Fed. (2d) 608 (County wide party's primary on same date as state party's primary).

In each and every case the Courts have ultimately held in favor of the right of franchise, but those determined upon discrimination have continuously conceived more subtle and sophisticated modes to accomplish a purpose inconsistent with democratic tenets and at odds with the growth of the concept of government by the consent of the governed.

Can it be doubted that the device of the Jaybird Primary will be seized upon in other communities and states to avoid *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757? If such procedures are valid on a county level, they are legal on a state level, for the same principles apply, with the result that the door is opened for circumvention of *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757.

II

We urge that the Court of Appeals failed to give full effect to the Trial Court's fact finding that the Jaybird Association is a political party. Such finding is binding on appeal, unless obviously wrong. *United States* v. *United States Gypsum*, 333 U. S. 364, 68 S. Ct. 525. *Federal Rule of Civil Procedure No. 52(a)*.

That finding of fact is amply supported by the evidence, which is reviewed under the Statement of the Case at

pages 5 and 6, *supra*. That finding has not been set aside by the Court of Appeals.

The Texas statutes regulate political parties with only County-wide organization, so if the Jaybird Association is in fact such a political party, it is subject to the statute, whether it has complied with it or not. The fact finding that it is a political party with only County organization places the Jaybird Association within the provisions of the statute. Statutory control is determined not by the desires of the party involved, but by the existence or non-existence of a certain factual picture. The Trial Court concluded that fact issue against the Jaybirds.

Consider the anomaly presented by the decision in this case and *Perry* v. *Cyphers*, 186 Fed. (2d) 608. In both we find county-wide political parties. The Citizens' Party of *Perry* v. *Cyphers, supra,* holds its primaries on the statutory date, and must therefore submit to the prohibitions of the Constitution; the Jaybird Association, also a county-wide political party, has violated the statute, with the result that it is immune from Constitutional restraint. It necessarily follows that the Citizens' Party can attain such immunity and avoid the effect of *Perry* v. *Cyphers, supra,* by following in the tracks of the Jaybirds and refusing to comply with the law.

Until and unless it can be said that the Trial Court's finding of fact that the Jaybird Association is a political party is obviously wrong, we are confronted with a premium set upon disobedience of law. A county-wide political party obtains immunity from the majesty of the Constitution of the United States by failing and refusing to obey statutory regulations of the State of Texas.

By committing the wrong of noncompliance with statutory procedures, the Jaybird Association is accomplishing the wrong of disenfranchisement. By disobedience the Association attains what would be denied it for obedience.

III

Consider the decision by the Court of Appeals in relation to the holding of the Fourth Circuit in *Rice* v. *Elmore*, 165 Fed. (2d) 387 (Cert. Den.), 333 U. S. 875, 68 S. Ct. 905. There the State of South Carolina had repealed *all* statutes regulating political parties. Nevertheless, the Court moved upon the theory that statutory regulation was not required in order for a political party to be an agency of the state. It concluded that political parties are state agencies by virtue of fact and custom, the presence or absence of statutory regulation not being of controlling significance.

Its conclusion was grounded on *United States* v. *Classic*, 313 U. S. 299, 61 S. Ct. 1031, which announced that "*even apart* from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice," the primary was state action because it predetermined the choice at the general election. The same doctrine was announced in *Newberry* v. *United States*, 256 U. S. 263, 285-287, 41 S. Ct. 476, 484: "As a practical matter, the ultimate choice of the mass of the voters is predetermined when the nominations have been made."

The record of the present cause is conclusive to the effect that the Jaybird Primary has predetermined the choice since 1889.

When *Rice* v. *Elmore, supra,* with no statutory regulation whatsoever, is compared with the cause before us, in which the state has enacted statutory regulations, which are disobeyed, a stronger cause for the constitutional injunction is here presented. Had we no statutory regulation here, *Rice* v. *Elmore, supra,* would be directly in point. Can it be possible that the attempted regulation has weakened our position?

IV

The Court of Appeals treated the Jaybird Party as a mere private organization unfettered by the Constitutional restraints. However, political parties are today considered agencies of the state, and as such are held subject to the Constitutional mandates. *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757.

After the decision of *Smith* v. *Allwright, supra*, the State of South Carolina endeavored to circumvent the ruling by repealing all statutes regulating political parties on the theory that the political party would thus become a private association with the right, as a private association, to exclude negroes from primaries on the grounds of race. With the statutes repealed, the Democratic Party of South Carolina enacted party rules excluding negroes from its primaries.

The constitutionality of this action reached the appellate courts in *Rice* v. *Elmore* (4th Cir.), 165 Fed. (2d) 387 (Cert. Denied, 333 U. S. 875, 68 S. Ct. 905). The party officials contended that the party rules were not prohibited by the Fourteenth Amendment, as the party was a private organization. *Rejecting this contention* the Court said:

> "The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, *political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people.* . . .
>
> . . . . . .
>
> "It is true, as defendants point out, that the primary involved in Smith v. Allwright was conducted under

the provisions of state law and not merely under party rules, as is the case here, but we do not think this a controlling distinction. *State law relating to the general election gives effect to what is done in the primary and makes it just as much a part of the election machinery of the state by which the people choose their officers as if it were regulated by law, as formerly.* Elections in South Carolina remain a two step process, whether the party primary be accounted a preliminary of the general election, or the general election be regarded as giving effect to what is done in the primary; and those who control the Democratic Party as well as the state government cannot by placing the first of the steps under officials of the party rather than of the state, absolve such officials from the limitations which the Federal Constitution imposes. *When these officials participate in what is a part of the state's election machinery, they are election officers of the state de facto if not de jure, and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise.* * * *." (Emphasis ours).

This concept is carried forward in *Baskin* v. *Brown* (4th Cir.), 174 Fed. (2d) 391, wherein party officials contended that the party, being unfettered by state statute, was free to exclude Negroes from the primaries; we quote:

> "* * * *When the organization of the party and the primary which it conducts are so used in connection with the general election that the latter merely registers and gives effect to the discrimination which they have sanctioned, such discrimination must be enjoined to safeguard the election itself from giving effect to that which the Constitution forbids.* * * *."

Such construction of the function of political parties is the one adopted by the Supreme Court, and is the one to be applied in the present cause.

Conclusion and Prayer

On the facts and authorities presented, the reasons for granting the Writ of Certiorari may be summarized as follows:

(1) The State of Texas has by statute recognized the place of the primaries of county-wide parties in the electoral scheme for choice of county officials.

(2) The State of Texas has by statute made the primaries of county-wide political parties an integral part of the procedure of choice of county officials.

(3) The Jaybird Association was found by the trial court on abundant proof to be a county-wide political party.

(4) Since 1889 the Jaybird Primaries have effectively controlled the nominations for county officials in the primaries of the Democratic party.

(5) Since 1889 the Jaybird Primaries have affected profoundly the choice of county officials in the general election.

(6) Since 1889 the Jaybird Primaries have effectively controlled the choice of county officials in the general election.

(7) State law of Texas relating to the general election gives effect to what is done in the Jaybird Primaries.

(8) By engrafting their primaries onto the state election process the Jaybird officials have become elections officers of the state *de facto*, if not *de jure*.

(9) Having established an elective process of the people of the county substantially affecting and effectively controlling the exercise of sovereignty by the people of the county, the Jaybird officials cannot violate the constitutional guaranty of the right of franchise.

(10) That choice of the voters in the Democratic Primaries and the general election has been predetermined by the Jaybird Primaries.

(11) The Jaybird Primaries are so used in connection with the Democratic Primaries and the general

election that the latter merely register and give effect to the unconstitutional discrimination practiced by the former.

(12). The Jaybird Primaries are but a sophisticated device to bring about racial discrimination in violation of the constitutional and statutory guaranty.

WHEREFORE, Petitioners respectfully pray that this Honorable Supreme Court of the United States grant the Writ of Certiorari to correct the error of the Honorable Court of Appeals in denying the Petitioners the right to vote in the only election that controls in their county.

Respectfully submitted,

IRA J. ALLEN,
J. EDWIN SMITH, and
GEORGE E. CIRE,
By IRA J. ALLEN,
Counsel for Petitioners,
John Terry, et al.

Address:
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APPENDIX "A"

ART. 3163. 3169 PARTIES WITHOUT STATE ORGANIZATION.

Any political party without a State organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day, which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a. m. and ten p. m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election. Id. sec. 100.—(Tex. Rev. Civ. Sta., (1925).)

APPENDIX "B"

SEC. 31. RACE, COLOR, OR PREVIOUS CONDITION NOT TO AFFECT RIGHT TO VOTE.

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R.S. Sec. 2004.—(8 U. S. C. A.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 52

JOHN TERRY, ET AL., *Petitioners*
v.
A. J. ADAMS, ET AL., *Respondents*

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 52

JOHN TERRY, ET AL., *Petitioners*

v.

A. J. ADAMS, ET AL., *Respondents*

BRIEF FOR PETITIONER, JOHN TERRY, ET AL.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Come now John Terry, Jessie Byers, R. E. Pink, Jr., Charlie Roberts, and Price Jackson, Petitioners, and respectfully submit the following Brief of their cause:

Opinions Below

The opinion of the District Court granting the Petitioners' right to vote in the primaries (R. 85-93) is reported in 90 Fed. Supp. 595. The opinion of the Court of Appeals (R. 103-114) denying Petitioners the right to vote in the primaries is reported in 193 Fed. 2d 600.

Jurisdictional Statement

Jurisdiction of this Court was invoked under 28 U.S.C.A. Section 1254 (1). The judgment of the Court of Appeals was entered on January 11, 1952 (R. 114). A petition for rehearing was filed on January 28, 1952 and was denied on February 20, 1952 (R. 115). Petition for Certiorari was presented on May 6, 1952 and was granted on November 17, 1952 (R. 117).

Petitioners are members of the Negro race (R. 37). They have been denied the right to vote in primaries of a county-wide political party solely on the ground of race or color (R. 27-28).

The trial court ruled their right to vote was guaranteed by Amendments 14 and 15 of the CONSTITUTION OF THE UNITED STATES and the provisions of 8 U. S. C. A., Section 31 (R. 85-93, 96).

The Court of Appeals for the Fifth Circuit held that the Amendments and statute were not applicable to the facts of this cause (103-114).

Whether the 14th and 15th Amendments to the CONSTITUTION OF THE UNITED STATES and the provisions of 8 U. S. C. A., Section 31, guarantee Petitioners the right to vote in primaries of a county-wide political party, presents a substantial Federal question within the jurisdiction of this Court.

Statutes Involved

The State of Texas has by statute regulated political parties with only County and Precinct organization, VERNON'S TEXAS ELECTION CODE, Article 13.54 (formerly TEX. REV. CIV. STAT. (1925) Article 3163). This statute is printed in Appendix A, p. 27, infra.

Petitioners rely in part upon 8 U. S. C. A., Section 31; this statute is printed in Appendix B, p. 28, infra.

Statement of the Case

Petitioners are members of the Negro Race and are resident citizens and qualified voters of Ft. Bend County, Texas, having poll-tax receipts or exemption certificates (R. 37). They brought the action for declaratory judgment and injunction on behalf of themselves and others like situated to determine the legality of their being excluded from voting in the Jaybird Primaries in Ft. Bend County, Texas solely on the basis of race or color (R. 2-6).

Respondents were sued individually and as representatives of a class, a county-wide political organization (R. 3). They all appeared in Court and stipulated that they were all officers of the Jaybird Democratic Association of Ft. Bend County, Texas (R. 25). Officials of the Association referred to it as the "Jaybird Party" (R. 78). The people of the County refer to it as the "Jaybird Party" (R. 59). The trial court found that the Association is commonly known as the "Jaybird Party" (R. 89).

The Jaybird Party of Ft. Bend County, Texas, officially named the Jaybird Democratic Association of Ft. Bend County, Texas, was organized in 1889 (R. 67). Since that date it has nominated for County and Precinct offices only (R. 30).

The function of the organization, as stated by Mr. A. J. Adams, its president, and Mr. R. M. Darst, an executive committeeman, is to elect the choices of the Association to public office and to have them run the government of the County (R. 46, 64).

The Association President, Mr. A. J. Adams, testified that it was not a Club such as the Rotary Club or the Lions Club and that its program was not of the character of that promoted by such clubs (R. 45).

Since 1889 the qualified voters of the County, with the

exception of Negroes, have participated in its conventions and primaries (R. 44-45, 75).

Since 1889 the nominees of this party have been the only names placed on the Democratic Primary ballots for County offices (R. 62, 78-79).

Since 1889 the nominees of this party have been the only names of the general election ballot for county offices (R. 47-48, 62, 78):

Since 1889, the nominees of this party for county offices have been elected to such offices (R. 47-48, 62, 78).

All white males and females of Ft. Bend County, Texas, who are qualified voters under the laws of the State of Texas and who have paid, or are exempt from paying, the poll tax are automatically members of the Association (R. 27, 44, 63, 74). The voting list of the county, with the exception of Negroes, comprises the membership of the Association (R. 65-106). When the elections are held the official poll tax lists are used, their being obtained free of charge from the office of the County Clerk (R. 45).

Organization of the Association parallels that of the Democratic Party in the precincts and county (R. 25, 26, 43, 76); by popular vote it chooses precinct judges for the twenty-two voting precincts of the county, who comprise the County Executive Committee (R. 25, 26, 43, 76).

Elections of the Association are called "primaries", a first primary and a run-off primary (R. 26-27). Candidates desiring to run for county or precinct offices make application to the Executive Committee and pay a filing fee set by the Executive Committee which amounts to between 2% and 3% of the salary paid for the offices to which the candidates aspire (R. 25).

Candidates in the primaries conduct public campaigns for nomination, putting up posters, announcing that they

are running for public office, distributing campaign literature, and publicizing themselves in newspapers of the county as candidates subject to the Jaybird Primaries in May (R. 48-50).

Voting in the primaries is by printed ballots and in the respective voting precincts of the county, paralleling other elections (R. 27-76). The voting is secret as in any other election (R. 76).

The votes are counted in the precincts and are then certified to the Executive Committee, which canvasses the returns and declares the result (R. 28, 76-77).

On this evidence the trial court found the Association to be a county-wide political party within the terms of TEX. REV. CIV. STAT. (1925) Art. 3163 (Now, VERNON'S TEXAS ELECTION CODE, Article 13.54); we quote the finding:

> "Such Association is a political party and comes clearly within the terms of Article 3163, Vernon's Texas Civil Statutes (1925) which regulates it and makes it an agency of the state." (R. 91-92).

The Jaybird Primaries are held in May and June of election years in advance of the statutory dates for primaries in July and August (R. 26-27, 77).

As to the purpose of not holding the primaries at the statutory times, Mr. D. R. Pearson, a founder of the Association, testified as follows:

> "Q. And if the law says they (negroes) should vote you want an election held where they cannot vote don't you?
> A. Well, I suppose I might say yes." (R. 77).

In a fuller manner Mr. A. J. Adams, President of the Association, testified to the same facts as follows:

"Q. *And then one of the purposes of your organization is for the specific purpose of excluding negroes from voting, isn't it?*

A. *Yes.*

Q. *And that is your policy?*

A. *Yes.*

Q. *I will ask you, that is the reason you hold your election in May rather than in June or July, isn't it?*

A. *Yes.*" (R. 59-60).

As to the object and purpose of the Association, the trial court made the following clear and explicit finding:

> "It is perfectly plain that the main and primary object of such Association has been from the beginning of its organization and still is to aid and enable the white voters of Fort Bend County to select and elect the County and Precinct officers of Fort Bend County and to deny the negro any voice or part therein." (R. 89).

The constitution of the Association in Article 15 provides an extra legal, but potentially effective, method of enforcing the choice of the Association in its primaries. We quote the provision:

> "We therefore declare that any white man now residing in this county, or who shall hereafter acquire citizenship in this county, who shall undertake to lead against this association any political faction or voting population opposed to the principles and objects of this association shall be considered and treated as a social and political outcast." (R. 51-52).

To the trial judge the president of the Association testified that this provision was enforced (R. 52), though he later contradicted himself (R. 53).

The trial court found that nomination by the Jaybird Primaries is equivalent to nomination by the Democratic

Primaries and is equivalent to election in the general election; the finding is quoted:

> "There is no other organization in Fort Bend County similar to such Association, and generally the persons endorsed in the Jaybird Primary are the only persons whose names appear on the ballot at the Democratic Primaries. And such persons are almost invariably elected or nominated at such Democratic Primaries and their names appear as Democratic Nominees on the official ballot at the General Election in November. The Democratic Nominees are almost invariably elected at such General Election. *In other words, an endorsement at the Jaybird Primary generally means an election at the General Election in November.* * * *". (Emphasis ours). (R. 89).

On the above facts and fact findings the trial court entered judgment giving Petitioners the constitutional right to vote in the Jaybird Primaries (R. 93-96). The Court of Appeals did not overturn the findings of fact but held that the law applicable to the facts authorized the exclusion of the Petitioners from the primaries on the sole ground of race or color (R. 103-114).

Specification of Errors to be Urged

Petitioners urge the following errors by the Honorable Court of Appeals:

I.

In holding that the Petitioners can be excluded from the Jaybird Primaries on the sole ground of race or color.

II.

In holding that the Jaybird Primaries are not state action.

III

In failing to hold that the rule of *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, entitles the Petitioners to vote in the Jaybird Primaries.

IV.

In holding that the Fourteenth and Fifteenth Amendments to the Constitution of the United States do not guarantee to Petitioners the right to vote in the Jaybird Primaries.

V.

In holding that the Jaybird Party can avoid the mandates of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and the rule of *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, by the device of holding its primaries a few days in advance of the dates set by the state statute.

VI.

In holding in direct conflict with the decisions by the Court of Appeals for the Fourth Circuit in *Rice v. Elmore* (4th Cir.), 65 Fed. 2d 387 (Cert. Den.), and *Baskin v. Brown* (4th Cir.), 174 Fed. 2d 391.

Summary of the Argument

By statutory regulation of them the State of Texas has recognized political parties with only county-wide organization and thus has made their primaries an integral part of the state election machinery. VERNON'S TEXAS ELECTION CODE, Article 13.54 (formerly TEX. REV. CIV. STAT. (1925), Article 3163 (quoted in Appendix A)), SMITH V. ALL-

WRIGHT, 321 U.S. 649, 64 S. Ct. 757. As the trial court found the Jaybird Party to be such a political party, it is subject to this statute and its effects.

As the trial court has held the Jaybird Party to be a political party it cannot attain immunity from the Constitution of the United States nor avoid the rule of SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757, by the device of violating a state statute by holding its primaries in advance of the statutory date. To permit this would place a premium on illegal conduct.

Since 1889 the Jaybird Primaries have effectively controlled and predetermined the choices in the Democratic Primaries and the general elections of the county. They are therefore controlled by the decision of this Court in SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757.

By engrafting its primaries onto the election processes of the State the Jaybird Party has become a *de facto* agency of the state subject to the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The Jaybird Party is in actual fact the local Democratic Party.

Argument and Authorities

I.

This cause presents for consideration another device for excluding members of the Negro race from the ballot box. It functions as follows:

(1) Hold a public primary election and run-off primary election a few weeks in advance of the statutory dates for primaries.

(2) Have the only contest that really counts in these advance primaries.

(3) Exclude Negroes from voting in these advance primaries.

(4) Put the nominees of these advance primaries on the ballots in the Democratic Primaries *without opposition.*

(5) Put the same nominees on the general election ballot *without opposition.*

Thus the Jaybird Primaries predetermine and effectively control the choice in the Democratic Primaries and in the general election. Thus Negroes are denied a voice in the only election that counts. Thus Negroes are denied a voice in the government of their county. This device is but a means of circumventing the rule of SMITH v. ALLWRIGHT, 321 U.S. 648, 64 S. Ct. 757, and the mandates of the Fourteenth and Fifteenth Amendments to the CONSTITUTION OF THE UNITED STATES.

The record demonstrates almost conclusively that the Jaybird Party is in actual fact the local Democratic Party. We respectfully advance the suggestion that the Court of Appeals has failed to give sufficient weight to the abundant evidence with which the record is replete on this point: For sixty years the local Democratic organization has submitted to the decisions and desires of the Jaybird Association, for it has accepted the latter's choice without contest, thereby sanctioning and participating in the discrimination practiced. Under most all rules of evidence a sixty-year course of acquiescence would mean agreement to, cooperation with, and participation in the activity.

This sixty-year submission in a heretofore ardently Democratic state identifies the Jaybird Association as the local Democratic Party organization. Where else in this state for the past sixty years has this turbulent party been so supine? Its local conspicuous quiescence is not only suspicious; it supports and compels the conclusion that it is, by the device of the Jaybird Primary, practicing discrim-

ination forbidden by the Constitution and this Court.

We strongly urge upon this Court the significance of the decision by the Court of Appeals, and the import of legal sanction of the Jaybird Primary, as setting a pattern for further and more extensive disenfranchisement of Negro citizens.

Every conceivable device, including this one, has been used in an effort to circumvent the Constitution and to deny to the Negro race an effective voice in elections. See: GUINN v. UNITED STATES, 238 U.S. 347, 35 S. Ct. 926 (The "grandfather clause"); NIXON v. HERNDON, 273 U.S. 536, 47 S. Ct. 446 (Statutory exclusion of Negroes from primaries); NIXON v. CONDON, 286 U.S. 73, 52 S. Ct. 484 (Delegation of control of party membership to the State Executive Committee of a party); LANE v. WILSON, 307 U.S. 268, 59 S. Ct. 872 (Complicated registration procedures); SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757 (Delegation of full control of membership to political parties); BASKIN v. BROWN, 174 Fed. 2d 391 (Membership in political party clubs); RICE v. ELMORE, 165 Fed. 2d 387 (Repeal of all statutory regulations); DAVIS v. SCHNELL, 81 Fed. Supp. 872 ("Understanding and explaining" the Constitution—the "Boswell Amendment"); PERRY v. CYPHERS, 186 Fed. 2d 608 (County-wide party's primary on same date as state party's primary).

In each and every case the Courts have ultimately held in favor of the right of franchise, but those determined on discrimination have continually conceived more subtle and sophisticated modes to accomplish a purpose inconsistent with democratic tenets and at odds with the growth of the concept of government by the consent of the governed.

Can it be doubted that the device of the Jaybird Primary if given legal sanction will be seized upon in other communities and states to avoid SMITH v. ALLWRIGHT, 321

U.S. 649, 64 S. Ct. 757? If such procedures are valid on a county level, they are legal on a state level, for the same principles apply, with the result that the door is opened for circumvention of SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757.

II.

We urge that the Court of Appeals failed to give full effect to the Trial Court's fact finding that the Jaybird Association is a political party. Such finding is binding on appeal, unless obviously wrong. UNITED STATES v. UNITED STATES GYPSUM, 333 U.S. 364, 68 S. Ct. 525. FEDERAL RULE OF CIVIL PROCEDURE No. 52 (a).

III.

That finding of fact is amply supported by the evidence, which is reviewed under the Statement of the Case at pages 3 to 6, supra. That finding has not been set aside by the Court of Appeals.

Under the facts, it is obvious that the Association is not a club such as the Rotary Club or Lions Club; its president expressly so testified. It is equally obvious that its endorsement is not comparable to that made by a labor union or ladies circle. The organization, territorially and structurally, and in its personnel and membership, is that of a political party. Its activities are those of a political party. Its purposes are those of a political party.

A "political party" is defined as an organization of persons, or association of voters, believing in certain principles of government, that attempt through their organization to elect officers of their party faith to the controls of government. HARRELL v. SULLIVAN, 220 Ind. 108, 40 N.E. 2d 115; COOPER v. CARTWRIGHT (Okla.), 195 Pac. 2d 290.

The Courts of Texas have similarly defined the term.

WAPLES v. MARRAST, 108 Tex. 5, 184 S.W. 180; SEAY v. LATHAM, 143 Tex. 1, 182 S.W. 2d 251.

In the WAPLES Case, supra, the Court said:

> "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as means of providing a course for the government in accord with their political principles and the administration of those agencies by their own adherents. * * * ."

Similar language is found in the SEAY Case, supra; we quote:

> "A political party is a voluntary association, instituted for political purposes."

Under these definitions the Jaybird Association is a political party, for it is a voluntary association with an organized structure, erected for the purpose of obtaining and keeping control of public offices. It holds public elections, for which aspirants for office campaign, and in which the public votes, for nomination of candidates of the organization. It can reasonably be considered nothing else than a political party.

It is undisputed that the Jaybird Association is without a state organization and that its organization and activities are confined to Ft. Bend County only. Consequently, the Association was, and is, within the terms of the Texas statute governing county-wide political parties. VERNON'S TEXAS ELECTION CODE, Article 13.54. The holding of the

elections on a date other than that prescribed by the statute is considered under the next section.

IV.

It has been the argument of the Respondents that the Association is not subject to the prohibitions of the Fourteenth and Fifteenth Amendments to the CONSTITUTION OF THE UNITED STATES, nor to the provisions of 8 U. S. C. A., Sec. 31, because it does not comply with VERNON'S TEXAS ELECTION CODE, Article 13.54, providing for the primary elections to be held on the legal primary day.

The Texas statutes regulate political parties with only County-wide organization, so if the Jaybird Association is in fact such a political party, it is subject to the statute, whether it has complied with it or not. The fact finding that it is a political party with only County organization places the Jaybird Association within the provisions of the statute. Statutory control is determined not by the desires of the party involved, but by the existence or non-existence of a certain factual picture. The Trial Court concluded that fact issue against the Jaybirds.

Consider the anomaly presented by the decisions of the Court of Appeals in this case and in PERRY V. CYPHERS, 186 Fed. 2d 608. In both we find county-wide political parties. The Citizens' Party of PERRY V. CYPHERS, supra, holds its primaries on the statutory date, and must therefore submit to the prohibitions of the Constitution; the Jaybird Association, also a county-wide political party, has violated the statute by holding its primaries in advance of the statutory date, with the result that it is immune from Constitutional restraint. It necessarily follows that the Citizens' Party can attain such immunity and avoid the effect

of PERRY v. CYPHERS, supra, by following in the tracks of the Jaybirds and refusing to comply with the law.

Until and unless it can be said that the Trial Court's finding of fact that the Jaybird Association is a political party is obviously wrong, we are confronted with a premium set upon disobedience of law. A county-wide political party obtains immunity from the majesty of the Constitution of the United States by failing and refusing to obey statutory regulations of the State of Texas.

By committing the wrong of non-compliance with statutory procedures, the Jaybird Association is accomplishing the wrong of disenfranchisement. By disobedience the Association attains what would be denied it for obedience.

The testimony quoted in the Statement of the Case shows unquestionably that the specific purpose of violating the statute is to exclude negroes from voting. That is the expressed policy of the Association.

We urge the fundamental doctrine that *a litigant does not and cannot acquire superior rights on a foundation of illegal conduct. By the device of violating a state statute the Jaybird Association can neither attain immunity from, nor circumvent, the Constitution of the United States and its enabling acts.* No authority need be cited for such principle.

Elsewhere it is shown there would be no question as to the right of Negroes to vote were the statute complied with. The Association's violation of the statute does not alter the constitutional principles, for the courts will establish no premium on an illegal act.

Should the device used by the Association be approved by this Court, the larger party organization of the various states could, and some probably would adopt the procedure as another means of disenfranchising citizens of the Negro race.

The Jaybird Primaries are so interwoven with the County Primaries of the Democratic Party, and their elective processes are so commingled, as to compel the conclusion that the Jaybird Association is but a county adjunct of the Democratic Party. As said in BASKIN v. BROWN (4th Cir.), 174 Fed. 2d 391, courts of equity are not blind to the actual facts and will sweep through the cobwebs of subterfuge to strike at the source of the evil they are seeking to prevent.

But one conclusion can reasonably be reached on the device of the Jaybird Primaries—that its purpose and result is and has been to deny to the Negro citizens of Ft. Bend County, Texas an effective voice in the government of their County and Precincts. Though a sophisticated device, it cannot be sustained. LANE v. WILSON, 307 U.S. 268, 59 S. Ct. 872. There the Supreme Court of the United States, speaking of the Fourteenth Amendment as applied to elections, decreed:

> "The Amendment nullifies sophisticated as well as simple minded modes of discrimination."

So, the device of holding party primaries on dates other than those prescribed by statute, ingenious though it may be, will not be sanctioned so as to permit racial discrimination in the elective process.

V.

Consider the decision by the Court of Appeals in relation to the holding of the Fourth Circuit in RICE v. ELMORE, 165 Fed. 2d 387 (Cert. Den., 333 U.S. 875, 68 S. Ct. 905), where the State of South Carolina had repealed *all* statutes regulating political parties. Nevertheless, the Court moved upon the theory that statutory regulation was not required

in order for a political party to be an agency of the state. It concluded that political parties are state agencies by virtue of fact and custom, the presence or absence of statutory regulation not being of controlling significance.

Its conclusion was grounded on UNITED STATES v. CLASSIC, 313 U.S. 299, 61 S. Ct. 1031, which announced that "*even apart* from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice," the primary was state action because it predetermined the choice at the general election. The same doctrine was announced in NEWBERRY v. UNITED STATES, 256 U.S. 263, 285-287, 41 S. Ct. 476, 484: "As a practical matter, the ultimate choice of the mass of the voters is predetermined when the nominations have been made."

The record of the present cause is conclusive to the effect that the Jaybird Primary has predetermined the choice since 1889.

When RICE v. ELMORE, *supra*, with no statutory regulation whatsoever, is compared with the cause before us, in which the state has enacted statutory regulations, which are disobeyed, a stronger cause for the constitutional injunction is here presented. Had we no statutory regulation here, RICE v. ELMORE, *supra*, would be directly in point. Can it be possible that the attempted regulation has weakened our position?

VI.

The Court of Appeals treated the Jaybird Party as a mere private organization unfettered by the Constitutional restraints. However, political parties are today considered agencies of the state, and as such are held subject to the Constitutional mandates. SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757.

The basis for SMITH v. ALLWRIGHT, *supra*, was the de-

cision by this Court in UNITED STATES v. CLASSIC, 313 U.S. 299, 61 S. Ct. 1031. In that case Federal jurisdiction and constitutional regulation and control of party primaries were decreed to exist when one or more of the following factors were present:

(1) The state law makes the primary an integral part of the procedure of choice.
(2) The primary in fact effectively controls the choice.
(3) The practical influence of the choice at the primary is so great as to affect profoundly the choice at the general election.

We here quote the applicable language from the CLASSIC case, supra:

"* * * *Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice,* the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, *even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice,* the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact already mentioned that *the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election* even though there is no

effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in NEWBERRY v. UNITED STATES, supra, 256 U.S. 263-269, 285, 287, 41 S. Ct. 476-478, 484, 65 L. Ed. 913." (Emphasis ours).

This doctrine of the CLASSIC decision is applicable to the Jaybird Primaries, as well as to the Democratic Primaries, for this record shows that the Jaybird Primaries effectively control, profoundly affect, and actually predetermine the choice of the County and Precinct officers in the general election. Also, the State of Texas has by statute made primaries of county-wide political parties an integral part of the procedure of choice; the statute recognizes and regulates such primaries and subjects them to other general requirements of the election code. VERNON'S TEXAS ELECTION CODE, Article 13.54. It has earlier been urged that the Jaybird Party can attain no immunity from the constitutional restraint by violation of the statutory prescriptions.

In SMITH v. ALLWRIGHT, supra, this Court expressly held that a political party could not practice racial discrimination in its primaries; there Your Honors decreed:

> *"It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."* (Emphasis ours).
>
> * * *
>
> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the

people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a *private organization* to practice racial discrimination in the election. *Consttutional rights would be of little value if they could be thus indirectly denied.* * * *" (Emphasis ours).

Further, the rationale of this Court is explained in the following language used:

"* * * The fusing by the Classic case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the Classic case cuts directly into the rationale of Grovey v. Townsend. This latter case was not mentioned in the opinion. Classic bears upon Grovey v. Townsend not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the *recognition of the place of the primary in the electoral scheme* makes clear that state delegation to a party of the power to fix the qualification of primary elections is delegation of a state function that may make the party's action the action of the state. * * *" (Emphasis ours).

In connection with this decision it should be emphasized that the Trial Court found the Jaybird Association to be a county-wide political party within the terms of VERNON'S TEXAS ELECTION CODE, Article 13.54. Consequently, racial discrimination cannot be practiced in its primaries, for as was pointed out in SMITH V. ALLWRIGHT, supra, constitutional rights would be of little value if they could be thus indirectly denied.

And the regulation of these county-wide primaries by the statutes brings this case within the rationale of the recog-

nition of these primaries in the electoral scheme of the County.

After the decision of SMITH v. ALLWRIGHT, supra, the State of South Carolina endeavored to circumvent the ruling by repealing all statutes regulating political parties on the theory that the political party would thus become a private association with the right, as a private association, to exclude negroes from primaries on the grounds of race. With the statutes repealed, the Democratic Party of South Carolina enacted party rules excluding negroes from its primaries.

The constitutionality of this action reached the appellate courts in RICE v. ELMORE (4th Cir.), 165 Fed. 2d 387 (Cert. Den., 333 U.S. 875, 68 S. Ct. 905). The party officials contended that the party rules were not prohibited by the Fourteenth Amendment, as the party was a private organization. *Rejecting this contention* the Court said:

> "The fundamental error in defendant's position consists in the premises that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, *political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people.* * * * ".
>
> * * *
>
> "It is true, as defendants point out, that the primary involved in Smith v. Allwright was conducted under the provisions of state law and not merely under party rules, as is the case here, but we do not think this a controlling distinction. *State law relating to the general election gives effect to what is done in the primary and makes it just as much a part of the election machinery*

of the state by which the people choose their officers as if it were regulated by law, as formerly. Elections in South Carolina remain a two step process, whether the party primary be accounted a preliminary of the general election, or the general election be regarded as giving effect to what is done in the primary; and those who control the Democratic Party as well as the state government cannot by placing the first of the steps under officials of the party rather than of the state, absolve such officials from the limitations which the Federal Constitution imposes. *When these officials participate in what is a part of the state's election machinery, they are election officers of the state de facto if not de jure, and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise.* * * *." (Emphasis ours).

This concept is carried forward in BASKIN v. BROWN (4th Cir.), 174 Fed. 2d 391, wherein party officials contended that the party, being unfettered by state statute was free to exclude Negroes from the primaries; we quote:

> "* * * *When the organization of the party and the primary which it conducts are so used in connection with the general election that the latter merely registers and gives effect to the discrimination which they have sanctioned, such dicrimination must be enjoined to safeguard the election itself from giving effect to that which the Constitution forbids.* * * *." (Emphasis ours).

The weight of the primaries on the results of the general election and the predetermination of the choice was recognized by Mr. Justice Pitney in NEWBERRY v. UNITED

STATES, 256 U.S. 263, 285-287, 41 S. Ct. 476, 484, when he wrote as follows:

> "* * * *it seems to me too clear for discussion that primary elections and nominating conventions are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government, that power to regulate them is within the general authority of Congress.* It is a matter of common knowledge that the great mass of the American electorate is grouped into political parties, to one or the other of which voters adhere with tenacity, due to their divergent views on questions of public policy, their interest, their environment, and various other influences, sentimental and historical. So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations, and constrained to consider their eligibility, in point of personal fitness, as affected by their party associations and their obligation to pursue more or less definite lines of policy, with which the voter may or may not agree. *As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.* * * *." (Emphasis ours).

Under the ruling of RICE v. ELMORE, supra, the Jaybird Party has by custom and practice become a state institution through which sovereign power is exercised by the people of the county. The officials of the party, participating in a part of the election machinery of the state are officers of the state *de facto* if not *de jure*, for state law relating to the primaries and the general election gives effect to what

is done in the Jaybird Primaries, though they be held in advance of the statutory dates.

The principle of BASKIN v. BROWN, *supra,* is applicable to the Jaybird Primaries for the organization of the Jaybird Party and the primaries which it conducts are so used in connection with the Democratic Primaries and the general election that the latter merely register and give effect to the discrimination sanctioned by the Jaybirds.

Similarly, the statements from NEWBERRY v. UNITED STATES, supra, are in point. The Jaybird Primaries are so closely intertwined with and related to the Democratic Primaries and the general election that an injunction against discrimination in the Jaybird Primaries is essential to avoid discrimination in the later ballotings. "*As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made*" *by the Jaybird Primaries.*

Conclusion and Prayer

On the facts and authorities presented, it is respectfully urged that the Honorable Court of Appeals was in error and that the Trial Court correctly determined the cause. The reasons are summarized as follows:

(1) The State of Texas has by statute recognized the place of the primaries of county-wide parties in the electoral scheme for choice of county officials.

(2) The State of Texas has by statute made the primaries of county-wide political parties an integral part of the procedure of choice of county officials.

(3) The Jaybird Association was found by the trial court on abundant proof to be a county-wide political party.

(4) Since 1889 the Jaybird Primaries have effectively controlled the nominations for county officials in the primaries of the Democratic party.

(5) Since 1889 the Jaybird Primaries have affected profoundly the choice of county officials in the general election.

(6) Since 1889 the Jaybird Primaries have effectively controlled the choice of county officials in the general election.

(7) State law of Texas relating to the general election gives effect to what is done in the Jaybird Primaries.

(8) By engrafting their primaries onto the state election process the Jaybird officials have become election officers of the state *de facto*, if not *de jure*.

(9) Having established an elective process of the people of the county substantially affecting and effectively controlling the exercise of sovereignty by the people of the county, the Jaybird officials cannot violate the constitutional guaranty of the right of franchise.

(10) The choice of the voters in the Democratic Primaries and the general election is predetermined by the Jaybird Primaries.

(11) The Jaybird Primaries are so used in connection with the Democratic Primaries and the general election that the latter merely register and give effect to the unconstitutional discrimination practiced by the former.

(12) The Jaybird Primaries are but a sophisticated device to bring about racial discrimination in violation of the constitutional and statutory guaranty.

WHEREFORE, Petitioners respectfully pray that this Honorable Supreme Court of the United States reverse the judgment of the Honorable Court of Appeals and affirm the judgment of the Trial Court, that it decree Petitioners and others like situated cannot be denied the right of franchise in the Jaybird Primaries on the basis of race or color and that it enjoin such discrimination.

Respectfully submitted,

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APPENDIX "A"

"VERNON'S TEXAS ELECTION CODE, ARTICLE 13.54—BY PARTIES WITHOUT STATE ORGANIZATION.

"Any political party without a State organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day, which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a. m. and ten p. m. on the date set by law. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election. Acts 1951, 52nd Leg. P. 1097, Ch. 492, Art. 231."

NOTE: At the time this cause was tried this statute was designated TEX. REV. CIV. STAT. (1925), Article 3163. In 1951 the Texas election laws were recodified and this article was re-enacted with the phrase "on the date set by law" being substituted for "of the preceding Saturday." The statute now bears the citation given above.

APPENDIX "B"

"8 U. S. C. A., SEC. 31. RACE, COLOR, OR PREVIOUS CONDITION NOT TO AFFECT RIGHT TO VOTE.

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R. S., Sec. 2004."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 52

JOHN TERRY, ET AL., *Petitionets,*

v.

A. J. ADAMS, ET AL., *Respondents*

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 52

JOHN TERRY, ET AL., *Petitioners,*

v.

A. J. ADAMS, ET AL., *Respondents*

BRIEF FOR RESPONDENTS, A. J. Adams, et al.

To The Honorable Supreme Court of the United States:

A. J. Adams and other respondents herein respectfully submit the following brief:

Jurisdictional Statement

This cause does not present a controversy within the jurisdiction of this court.

Petitioners have not been denied the "right to vote in primaries of a county-wide political party";

1. The Jaybird Democratic Association of Fort Bend County, Texas does not exercise any of the func-

tions of a political party under the election laws of the State of Texas. (Art. 3163, T.R.C.S., R. 111; R. 24-25; Appendix p. 47).

2. The Jaybird Democratic Association does not hold a "primary"; a "primary election" being "an election held by the members of an organized political party for the purpose of nominating the candidates of such party to be voted for at a general or special election, * * * " (Art. 3100 T.R. C.S., Appendix p. 43; R. 24-25, 28-29).

3. There is no recognition by the State nor by any political party of the State of any action by the Jaybird Democratic Association (supra).

No political or civil rights of Petitioners have been denied and no Federal question is presented.

Statutes Involved

References to the Texas Statutes will be by the Article designations during the period pertinent hereto, as distinguished from different designations in the 1951 Texas Election Code covering the subject matter.

Article 3163 T.R.C.S. is relied on by Petitioners, but for a clear understanding additional Texas Statutes are printed in full in the Appendix hereto, p. 47.

Statement of the Case

This action presents matters of first impression.

Neither the Supreme Court of the United States nor a Court of Appeals has earlier passed upon a factual situation, nor the legal questions, as here involved.

The right of the Negro to vote in General Elections and in Primary Elections conducted under the law, has been decided. Such questions are not in this case. Nor do we have involved any question of long-established Primary Election machinery being repealed, amended or "juggled" for the purpose of avoiding a statute or new court decision.

The Statement of the Case by Petitioners is susceptible of misconstruction with consequent misunderstanding of asserted facts, or legal results therefrom, variant from the record; and Respondents therefore make this Statement.

Due to conditions during and following the Reconstruction Period (R. 38-39), the Jaybird Democratic Association of Fort Bend County, Texas was organized in 1889 with the stated object:

> "The object of this Association shall be to secure to the people of Fort Bend County economic and honest county government and the election of honest and faithful county officials",

and its membership was and is limited to bona fide white citizens of the county (R. 24, 27, 38-40) whether they be Democrats, Republicans or white members of other political parties (R. 74); and there is no connection between the Jaybird Democratic Association and the Democratic Party in the State of Texas (R. 74).

The occasion for white membership only is quoted by the Court of Appeals from the testimony of Judge D. R. Pearson, an original member of the Association:

> "One of the major occasions for limiting the membership of the Association to white people was that the negro vote had been controlled by—I will call them bad white people * * * and thought that by combining the white people and keeping the bad white people separated from the darkies who were easily led, that

we could obtain good government and the exclusion of the negro was merely an accident (incident) of our purpose. The Association was not formed, was not directed against the negro, it was directed against the bad white men who were leading astray the darkies. * * * As a matter of fact, prior to 1950, none of our negro friends ever asked to be admitted to membership in the Democratic Jaybird Association." (R. 113, 69-70).

That the object of the Association has been accomplished is demonstrated by the testimony of Judge D. R. Peareson:

"Q. Judge Peareson, there have been some questions directed toward the success of the good folks that the Jaybird Democratic Association has endorsed and who have thereafter been nominated in the July Democratic primary and thereafter elected in the general election. What has been the experience of the Jaybird Association in its effort to endorse good folks for office?

A. Why they have always sought to endorse capable and honest officials. And there is only one instance since the Association has been formed where its endorsee proved false to his trust. That is one man who was selected and endorsed by the Association and elected who did some acts that were not in accordance with the law.

Q. Other than that one instance, Judge, where a Jaybird Association endorsee was thereafter nominated in the July primary and elected in the November general election, has any other person so endorsed by the Association ever failed to give good, honest and efficient acquittance of his office?

A. I think not. I think the administration of affairs has been very well conducted all the way through with that single exception.

Q. Have we ever had, Judge, to your knowledge, any complaint from any of our colored friends about the administration or the performance of the duties

of any elected official in Fort Bend County who had been earlier endorsed by the Association?
A. Not prior to January 1, 1950." (R. 81).

Virtually all of the pertinent facts are covered by the Stipulation (R. 23-38) and the Qualified Stipulation (R. 38-40), and the general coverage of the main items therein is:

The Jaybird Democratic Association "primaries" are held in May and June; and the Statutory Primary Election is held by the Democratic Party on the fourth Saturday in July and the fourth Saturday in August as required by Article 3102 TEXAS R.C.S. (R. 23-24).

There is no "Jaybird Party" in Fort Bend County, Texas, but at all times since 1889 the "Jaybird Democratic Association of Fort Bend County, Texas" has existed (R. 24) and has an Executive Committee representing each of the twenty-two voting precincts of the Association (R. 25).

The Executive Committee handles all the details of the Association Primaries, including determining eligibility of applicants, dates of primaries, fees to be paid, preparation of ballot (R. 25-26); canvasses the returns from the twenty-two voting precincts and announces the endorsees of the Association, but *no results of the voting are certified by or to any person, committee or official* (R. 28).

Membership in the Association is limited to white males and females who endorse the principles of the Association and who are eligible to vote (R. 27-28); and a rule of the Association prohibits the endorsement of a member for any office which he has held for two terms, and the application of any such member for a position on the Jaybird Association ballot is rejected (R. 26).

Membership in a political party does not disqualify a person from membership in the Jaybird Democratic Asso-

ciation nor does membership in the Association disqualify a person from membership in any political party (R. 29-30).

Members of the Negro race are not admitted to membership in the Association under its rules of membership and petitioners would be denied a ballot and a vote if they presented themselves, since to permit them to vote would be contrary to the present policy, rules and regulations of the Association (R. 27-28).

The Jaybird Democratic Association does not do any of the things provided by Art. 3163 to be done by a political party acting thereunder (R. 24-25).

There is no compulsion upon any person receiving endorsement of the Association to run for office. *Any qualified applicant* for a position on a Democratic Party ballot for a July primary of such party *must himself comply* with the laws prerequisite to securing a place on said ballot *whether he is or is not an endorsee of the Jaybird Democratic Association;* and every qualified applicant who does comply with the law is placed on the Democratic Party Primary ballot whether or not endorsed by the Association (R. 28-29).

No member of the Negro race nor any other qualified person has been refused a place on the Democratic Party Primary ballot nor a right to vote in the Democratic Party statutory Primary (R. 29). Since 1938 the persons winning the endorsement of the Jaybird Democratic Association at its Primaries have generally applied for positions on the Democratic ballot in the statutory July Primary; have usually been nominated thereat and elected at the general election (R. 30); but in various instances the Jaybird Democratic Association has not endorsed any person for various offices, and in various instances the endorsees of the Jaybird Democratic Association have been defeated in the Democratic Party July Primary (R. 31-37).

Petitioners are qualified voters in Fort Bend County, Texas (R. 37); have never applied for a position on the July Democratic Party Primary ballot nor sought such filing by or on behalf of any other person. Petitioners are not members of any local political organization but three thereof are members of the National Association for the Advancement of Colored People (R. 37).

At this point we feel constrained to clarify certain statements in Petitioner's statement of the case:

The witness, Judge Peareson, did inadvertently repeat the phrase "Jaybird Party" from the question asked, in correcting the word "Nominee" as therein used, to "endorsee" (R. 78).

The witness, Adams, had not heard of people referring to the Association as the "Jaybird Party" (R. 59); nor had the witness, Darst (R. 63).

The trial court did state that the Association is generally known as the Jaybird Party (R. 89), but without basis in the record other than in Petitioners' pleading, contrary to the stipulation (R. 24) and not upheld by the Court of Appeals.

The Record reference (p. 30) that the Association has "nominated" for offices, shows it only "indorsed" and the official statutory Democratic Party primary "nominated".

The Association does endorse good men to get them elected to office (R. 46, 64); but after the results of the Association balloting are announced, neither the Association nor its Executive Committee further participates in securing the election of the endorsees, but its activities cease (R. 28-29, 40, 56, 73-74) and all members are free to vote their convictions in the subsequent statutory Democratic Primary (R. 58, 74).

Petitioners convey an erroneous impression by their statements that since 1889 the "nominees of this party" have been the only names on the Democratic Primary and General Election Ballots and have been elected to County offices (Brief, p. 4). The stipulation (R. 23-38) affirmatively does not cover matters prior to 1938 (R. 31); shows numerous instances in which endorsement by the Association was not sought; others in which Association indorsees were defeated in the Democratic Primary and others in which persons whose applications for endorsement were rejected, were nevertheless nominated in the Democratic Primary and elected (R. 30-37); and another in which the Association indorsee defeated a prior Association-indorsed incumbent who had served two terms as County Judge (R. 79).

Campaign cards, etc., showed candidates as "subject to the action of the Jaybird primaries in May and the Democratic primaries in July"; and any candidate defeated in the Jaybird primary "can keep right on running" (R. 49-50).

The brief quotations in Petitioners brief purporting to show purposeful holding of May voting to exclude negroes, are not fairly representative; the Association primarily desires to determine what good men it should endorse, the Negroes are permitted to vote in the statutory July primary and their exclusion from the May Jaybird Association voting is merely incidental and not the main purpose (R. 60, 63-64, 77, 79).

Any person can take the statutory steps to place himself or others on the ballot in the official statutory July primary election, or can "write-in" the person for whom he desires to vote (R. 78-79, 29, 80), and no qualified person has ever been refused a place on such July primary ballot (R. 80).

The Jaybird "primaries" are held in May and June and the official statutory Democratic primary party elections are held in July and August (R. 23-24) and the Association voting has never been held on the same day as the Democratic party primaries (R. 46-47).

The Court of Appeals points out the cause of error by the District Judge with reference to the facts, with the statement that the undertaking to abstract the stipulation of facts offered by Plaintiff, is done

> "* * * with undue meagerness and with the result of not making clear what the real facts as stipulated are * * *"

and * * * "because the facts are undisputed, and because the question at issue is one not of fact but of law," * * * quotes controlling facts from the stipulation as to what the Association does and does not do, and summarizes other controlling facts (R. 107-109), including:

> "Said Association, however, has not since 1938, and it does not: (a) Have a State organization; (b) Follow or attempt to comply with any of the provisions of Article 3163 of the Revised Statutes of Texas, or of any other statutes of the State of Texas with reference to primary elections or general elections; (c) Hold any convention or 'primary election' on the legal primary election day, to-wit: The fourth Saturday in July or the fourth Saturday in August, of any year; (d) Hold any primary convention in any precinct on the Saturday preceding a legal primary election day; (e) By the chairman of a county committee, or otherwise, certify to the County Clerk of Fort Bend County,

Texas, or to the County Judge thereof, or to any official committee or other representative of the Democratic or Republican party, any nominations or indorsements made by the Association; (f) Have, or cause to be, printed in a separate column headed by the Association name any nominations of any official ballot used, or for use in, a primary or general election held on a legal primary election day or general election day; (nor does the name, Jaybird Democratic Association of Fort Bend County, Texas, or any part of indication thereof, appear on any ballot in any election other than the primaries, or other special voting occasions, held by the Association itself and alone); (g) Make, or cause to be made, a written application to the County Judge for such printing, signed and sworn to by 3 percent of the entire vote cast in Fort Bend County at the last preceding general election."

* * *

"The ballots from each voting precinct are canvassed by the Executive Committee which declares the results of such canvass and announces the identity of the persons who have received the indorsement. No officer nor committee of such association certified the result of the vote or any nominations of the association to the County Clerk of Fort Bend County, to the Democratic County Executive Committee, nor to the committee or official of any party of a statewide organization.

"No person who receives the indorsement of the Jaybird Association is compelled to run in the Democratic primary, but if he wishes to run he may do so. But he must himself file his application with the Executive chairman or committee of the Democratic party, must independently comply with the requirements of the Democratic party or the law, and must himself pay the fee as provided by law. Neither the Jaybird Association nor anybody for it applies to the Democratic

party for the placing of its nominee on the ballot for the Democratic party election."

In reversing the District Court, the Court of Appeals olds:

"Here, as a comparison, point by point, of the provisions of Article 3163, with the stipulated facts set out in note 3, supra, will show, *the Jaybird Democratic Association does not in any way or manner operate as a part or parcel of, or in liaison with, state political or elective machinery.* In short, *it is not a part of the two step arrangement, the Democratic primary and the general election, so as to make its action state action.*"

* * *

"What and all that is for decision here is *whether the complained of action is action under color of state law,* depriving plaintiffs of rights accorded them by the invoked constitutional and statutory provisions. To answer that question in the affirmative and to hold that it is, would be, we think, to go directly contrary to the long line of cases beginning with the Civil Rights cases, 109 U.S. 3, and ending with Collins v. Hardyman, supra. In that case it was said:

> "While we have not been in agreement as to the interpretation and application of some of the post-Civil War legislation, the Court recently unanimously declared, through the Chief Justice:
>
> "'Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the (fol. 160) *action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'"

Denial of Errors Urged By Petitioners

1.

The Court of Appeals correctly held that the Constitutional prohibition against abridgment or deprivation of civil rights applies to only State action.

2.

The Court of Appeals correctly held that the Jaybird Democratic Association does not operate as a part or parcel of, or in liaison with, State political or elective machinery and that its action is not State action.

3.

The Court of Appeals correctly held that the rule of SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757, and the decisions in RICE v. ELMORE, 65 Fed. 2d 387, and BASKIN v. BROWN, 174 Fed. 2d 387, are not applicable to this cause.

Summary of the Argument

A careful review of the applicable Constitutional and Statutory provisions and of Court decisions cited by both parties, with a proper analysis of the facts and basic legal principles actually involved, conclusively demonstrates that the prohibition against discrimination and denial of rights is directed to the United States and the States themselves, their agencies and organizations or individuals performing functions of and for the State. Private organizations and individuals, not agencies of the State nor performing functions thereof or therefor, are not subject to such prohibitions.

While each overlaps, the argument may be summarized under the following points:

1. The State of Texas, by statutes, has expressly prescribed procedures and machinery regulating Primary and General Elections; and acts of groups or individuals not in compliance therewith are void and of no effect. (Extended in Argument Par. 1 hereof, controverting Petitioner's Arg. Pars. II and III.)

2. The Jaybird Democratic Association is not a political party subject to or controlled by Article 3163, TEXAS REVISED CIVIL STATUTES. (Extended in Argument Par. 2 hereof, controverting Petitioner's Arg. Pars. II and III.)

3. The Jaybird Democratic Association has never operated under any provision of the law, has never accepted any benefits from, nor yielded any inherent power to, the State, but has always conducted its affairs independently of, and without regard to, or encroachment upon, or in conflict with, the provisions of the Texas Election Laws. No binding nor legally enforceable result comes from its "Primaries"; no person acquires any rights nor official recognition by reason of participation therein, nor is any person deprived of any legal right by being denied participation therein. Its balloting is therefore merely a straw vote and of no legal consequences; and its "Primaries" are in no way recognized, adopted nor acquiesced in by the State of Texas nor any subdivision nor agency thereof. (Extended in Argument Par. 3 hereof, controverting Petitioner's Arg. Pars. I, II and III.)

4. The Jaybird Democratic Association was organized in 1889 in the sole interest of economic and honest county government and the election of honest and faithful county officials. The Texas Primary Election Law was first passed in 1905. The Jaybird Association elected to not accept the permissive procedures of Article 3163, and to not become a part of, nor participate in, the State electoral machinery; and its decision, unchanged in the forty-five years prior to

this suit, cannot be considered a "device" to violate the law nor circumvent the Constitution, nor to preclude negroes from voting in any official Primary or effective election. (Extended in Argument Par. 4 hereof, controverting Petitioner's Arg. Pars. I and IV.)

5. The Jaybird Democratic Association is not an agency of the State in determining the participants in its Primaries; does not determine the participants in a State Primary election, nor engraft its procedure or purpose upon the State-prescribed election process or machinery; and does not, under State statute or color of the law, assume nor exercise any political function. The rule applied in SMITH v. ALLWRIGHT (321 U.S. 649, 64 S. Ct. 757) does not apply to the case now before the Court. (Extended in Argument Par. 5 hereof, controverting Petitioner's Arg. Pars. IV, V and VI.)

6. The Jaybird Democratic Association does not deny to Petitioners, nor in any way abridge, any right to which they are entitled nor which is guaranteed to them under the Constitution and laws of the United States. (Extended in Argument Par. 6 hereof, controverting Petitioner's Arg. Par. IV.)

7. The right to vote, protected by the Federal Constitution and Statutes, is the right to vote in an official political election. These provisions do not cover voting in private organizations—fraternal, religious, labor, social, or even organizations political in character not exercising functions of the State nor participating in State electoral processes. The contention in this case is that a Negro, by virtue of his color, has the right to vote wherever, whenever and within whatever organization voting may be conducted. Petitioners, not being members of the association, and the balloting of the members not being official nor legally effec-

tive, have been deprived of no right, and have no right to maintain this suit. (Extended in Argument Par. 7 hereof, controverting Petitioner's Arg. Par. IV.)

Argument and Authorities

1.

(Controverting Petitioner's Argument Paragraphs II and III.)

This case presents no issue concerning General Elections. Similarly no issue is presented concerning Primary Elections conducted under, or in accordance with, the Primary Election Laws of Texas.

The Texas Statute urged by Petitioners as controlling is Article 3163, quoted in Appendix P hereof (now known as TEXAS ELECTION CODE, Article 13.54).

For clarity, the Texas Primary Election laws are divided into several sections in Chapter 13, Title 50, REVISED CIVIL STATUTES OF TEXAS, and provide for NOMINATIONS:

> "1. By parties of one hundred thousand votes and over" amended in 1945 to two hundred thousand votes)—Art. 3100 to 3153 Texas R. C. S.
>
> "2. By parties of ten thousand and less than one hundred thousand votes"—Art. 3154 to 3158 (amended in 1945 to less than two hundred thousand votes).
>
> "3. Non-partisan and independent candidates." Art. 3159 to 3162.
>
> "4. By parties without State organizations." Art. 3163,

and it is only by reference in particular statutes, that the provisions of other grouped articles are applicable thereto.

Art. 3100 TEXAS REVISED CIVIL STATUTES, defines "Primary elections" as "*an election* held by the members of an

organized political party *for the purpose of nominating the candidates of such party to be voted for at a general or special election,* or to nominate the county executive officers of a party."

The Jaybird Democratic Association voting is therefore not a "Primary Election", since the association *does not nominate candidates* of the association nor candidates *to be voted for at a general or special election,* nor county executive officers of a party.

Article 3101 (as amended in 1945) provides candidates for State offices, candidates for Congress and district offices in districts comprising more than one county who are to be nominated by each organized political party casting over two hundred thousand votes " * * * shall, together with *all candidates for office* to be filled by the voters of a county, or of a portion of a county, *be nominated in primary elections* by the qualified voters of such party."

Art. 3102 provides that the *fourth Saturday in July "shall be general primary election day, and primary elections* to nominate candidates for a general election *shall be held on no other day,* except when specially authorized."

The above provisions contain the mandatory "shall". Thus, any person desiring to be nominated for an office to be filled by the voters of any county or portion thereof *must be nominated* in a *legal primary election* which may be *held only on the fourth Saturday in July.*

Art. 3154 grants permission to political parties casting more than ten thousand and less than two hundred thousand votes to nominate candidates "under the provisions of this law by primary elections", * * * which are held on the primary election day.

Non-partisan or independent candidates may have their names printed on the official ballot by complying with Articles 3159-3162.

Art. 3163 (quoted in full in an appendix hereto) is with specific reference to only a "*political party* without a state organization *desiring to nominate candidates* for county and precinct offices only * * * ," and by its express wording that such a party " * * * *may nominate* such candidates therefor under the provisions of this Title" * * * is merely a *permissive* statute granting authority to local political parties which, in the absence of the statute, cannot nominate candidates, and which can nominate candidates only upon condition that they be nominated in the prescribed manner.

The purpose of a nomination is to provide a vehicle by which the nominee becomes entitled to have his name placed on the "official ballot" in a general election, as Art. 2978 TEX. R. C. S. provides:

> " * * * no name shall appear on the official ballot except that of a candidate who was *actually nominated* (either as a party nominee or as a nonpartisan or independent candidate), *in accordance with the provisions of this Title.* * * * "

These Statutes are strictly construed and acts not in compliance therewith have no effect but are void, for example:

BOUNDS v. MCCALLUM, Texas Comm. of Appeals, 52 S.W. 2d 1047 (1932), holding that since a party operating under Article 3163 is limited to county and precinct officers, its candidates for district offices, nominated at a regular primary on the statutory primary election day, were *not "nominated under statutory authority"*, and they were *therefore ineligible* to appear on the official general election ballot and were excluded therefrom on the suit of Democratic Party nominees.

PULLIAM v. TRAWALTER, Tex. Civ. App., 120 S.W. 2d 108, (1938), holding that since the Republican Party did

not assemble *in the manner* and *at the time required by law* for its convention, its nominee for Sheriff was *not "chosen in accordance with the law* as a nominee of any party" *and was excluded* from the ballot on the suit of the Democratic Party nominee.

STATE v. NORRISS, Tex. Civ. App., 33 S.W. 2d 850 (1930), holding that the primary election statutes

> "only *required* such nomination to be determined by a primary election when the candidates were those of an organized political party that cast one hundred thousand or more votes at the last preceding general election."

and that therefore the "White Man's Union Association" operating under Article 3163 was *not required* to hold a primary election and therefore the Corrupt Practices Act was not applicable to it.

Under the specific wording of the statutes and under the holdings in the above cases, any political party which does desire to nominate candidates for county and precinct offices only, as provided in Article 3163, must comply with each of the provisions of said statute; otherwise such acts as it does perform are futile.

Persons participating in such a futile act obtain no benefit thereby; and persons not participating therein are deprived of no right and suffer no detriment therefrom.

2-3.

(Controverting Petitioner's Argument Paragraphs I, II and III.)

Article 3163 provides:

> "Any *political party* without a state organization *desiring to nominate candidates* for county and precinct

offices only *may nominate* such candidates therefor *under the provisions of this Title* by primary elections or by a county convention *held on the legal primary election day,* * * * "

and specifies the procedure.

The time schedule of the Jaybird pre-primary balloting and the dates thereof in 1950 were:

First Preference Election	May 6, 1950
Run-off Preference Election	June 3, 1950

The time schedule of Texas elections is statutory and the dates of elections in 1950 were:

Date of request for a candidate for nomination for a place on the ballot in general primary (Art. 3113)	June 17, 1950
General primary election date (Art. 3102)	July 22, 1950
Run-off primary (Art. 3102)	Aug. 26, 1950
General election	Nov. 7, 1950

The Jaybird Association balloting is not an "election by the people", has no recognition, validity nor effect under the law, and persons endorsed or "nominated" acquire no rights nor official recognition by reason thereof.

The following analysis under Art. 3163 conclusively demonstrates that the activities of the Jaybird Democratic Association in no way attempt to accept the permission granted by Art. 3163 nor to follow nor coincide with any

law, but, to the contrary, demonstrates that the balloting by the Jaybird Association membership is merely an independent "straw vote" and an expression of opinion and preference as between persons who are contemplating subsequently applying for a position on the ballot for the statutory Democratic primary in July.

Provisions of Art. 3163	*Actions of Jaybird Association*
1. "Any political party without a State organization * * * *"	1. The Jaybird Association is without a State organization and is not affiliated with any State organization; but is not a political party.
2. "* * * * desiring to nominate candidates for county and precinct offices only * * * *"	2. The Jaybird Association has never desired to nominate, and has never nominated such candidates; and the most that can be said of the balloting of its members is that the Association determines thereby the preferences of the members as between persons who are contemplating applying for positions on the ballot for the statutory July Democratic Party primary.
3. "* * * * may nominate such candidates therefor under the provisions of this title * * * *"	3. The Jaybird Association has not accepted the permission extended by the statute and does no act or thing under the provisions of the Title "Elections" of the Texas statutes.

4. " * * * by primary election or by a county convention held on legal primary election day * * * "

4. The Jaybird Association holds no election or balloting of any kind on the legal primary election day; and does not hold a county convention on such day, or otherwise, and does not elect delegates to such a convention at any time.

"Primary election" is defined in Art. 3100 Texas R. C. S. as an election by members of an organized political party who nominate the candidates of such party "to be voted for at a general or special election * * * ". The Jaybird Association does not nominate any candidates to be voted on at any election.

5. " * * * all nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party * * * "

5. No nominations are made by the Jaybird Association; no preference expressions by its members are certified to the county clerk or any other official or committee of any party or governmental subdivision.

6. " * * * parties so certified shall be printed on the official ballot in a special column headed by the name of the party; * * * "

6. No nominations and no preferences of the Jaybird Association members are printed on any official ballot, and neither the name of the Jaybird Democratic Association of Fort Bend County, Texas, nor any part thereof appears, nor has it ever ap-

peared, on any ballot at the statutory July primary or subsequent general election.

7. * * * provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per-cent of the entire vote cast in said county at the general election."

7. No written application is made by or on behalf of the Jaybird Association nor by nor on behalf of any nominee or endorsee as such of the Association or of its members; in the event the person, or persons, "endorsed" or for whom preference is expressed by the Jaybird Association membership in their May or June balloting, desires a place on the statutory July ballot, it is entirely up to such person to comply with the laws applicable to all persons who desire their names placed on such ballot. The Jaybird endorsement has no connection with such person's application for a ballot position.

The Jaybird Association has never participated in a General Election, nor has its name ever appeared on a ballot therein.

As held herein by the Court of Appeals:

"Here, as a comparison, point by point, of the provisions of Article 3165, with the stipulated facts set out in note 3, supra (R. 107-109), will show, the Jaybird Democratic Association does not in any way or manner operate as a part or parcel of, or in liaison with,

state political or elective machinery. In short, it is not a part of the two step arrangement, the Democratic primary and the general election, so as to make its action state action." (R. 111)

The Jaybird Democratic Association has never appeared, nor applied for printing its name, on the official ballot in any General Election; nor has any of its endorsees applied for a place on the official ballot in a special column headed by the name of the party. If the Association is a political party, its preference winners are complete outcasts so far as the election machine and the election laws of the State of Texas are concerned.

Assuming, for the point, that the Jaybird Democratic Association desired to accept the permission granted in Article 3163, still the Association does none of the things requisite under Article 3163. It therefore has no right to enter its party name nor the name of its endorsees on the statutory General Election ballot, and neither it nor its endorsees are entitled to, nor have, any recognition under the law.

As quoted by Petitioners from WAPLES v. MARRAST, 108 Tex. 5, 184 S.W. 180,

> "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain *political principles* or beliefs *in the public policies* of the government. As rivals for popular favor they strive at the *general elections* for the control of the agencies of the government as means of providing a course for the government in accord with their political principles and the administration of those agencies by their own adherents. * * * "

Such an organization and the designation "political party" contemplates difference in views on tariffs, taxes, foreign

relations and innumerable other items—as distinguished from the sole purpose and object of the Jaybird Association:

> "To secure to the people of Fort Bend County economic and honest county government and the election of honest and faithful county officials."

The desire and effort to secure economic and honest government and the election of honest and faithful officials should be axiomatic in all individuals and organizations as well as in political parties, and certainly does not constitute such a political principle or belief in public policies as to characterize the Jaybird Association a political party within the meaning of the statute.

The Jaybird Democratic Association has never acted under any law, has at all times conducted its own affairs on a strictly unofficial and independent local level, accepting nothing from the State and asking nothing except its Constitutional rights to manage its own affairs without outside interference.

4.

(Controverting Petitioner's Argument Paragraphs I and IV.)

To assert, as do Petitioners, that the Jaybird Association balloting is a "device" to circumvent the Constitution and to deny Negroes an effective voice in elections, is without basis in history, fact and law.

To say that the Jaybird Association balloting is the only contest that really counts and that the Association puts its "nominees" on the ballot in the official statutory Democratic Party Primaries and in the General Election without opposition is contrary to the true facts, including those stipulated by the parties.

The Jaybird Democratic Association was organized in 1889 in an effort to secure honest and efficient local government which had been destroyed during Reconstruction. There were then no Primary Elections and the status of the Association was strictly a civic organization of honest, upright citizens advocating honesty in government and of officials.

When the Texas Primary Law was passed in 1905, the status of the Jaybird Democratic Association remained unchanged. The Association did not desire to participate in politics, and did not accept the authorization of Article 3163 to become a political party nor to nominate and put candidates on the General Election ballot. It did, however, continue its interest in honest government by providing an informal method by which its members could express their preference between potential candidates, who themselves might or not later apply for a position on the official Primary Election ballot.

This method of endorsement of a potential candidate is no more effective than approvals of candidacy by churches, labor unions, or newspaper advertisements or editorials. It is not, and never has been, a substitute for any part or portion of the election machinery of the State; it does not circumvent the Constitution or laws, but is merely a straw vote without reference thereto, and cannot in any way infringe upon the rights of qualified voters nor candidates for office in a Primary or General election.

The Jaybird Association balloting counts for nothing, predetermines nothing and controls nothing.

While the record (pp. 30-36) gives several examples affirmatively contradicting Petitioners, we here mention only the specific example of I. G. Wirtz, Sr., who was County Commissioner for many years without the endorsement of the Jaybird Association, and of I. G. Wirtz, Jr., who was

the endorsee of the Jaybird Association in 1940 and 1942, was rejected by the Association (under its two-term limitation rule) thereafter, but who nevertheless won in the official Democratic Primary and in the General Election in 1944, 1946 and 1948.

Petitioners' assertion that the Jaybird Association is, in fact, the local Democratic Party and that the latter has for sixty years submitted to the decisions and desires of the Association, which is therefore merely a "device", is contradicted by the record and perhaps results from confusing the present case with PERRY v. CYPHERS, 186 Fed. 2d 608.

In PERRY v. CYPHERS, supra, the Democratic Party Primary ballot did not include the names of any candidate for any county or precinct office. The Citizens Party (strictly a white man's party) held its Primary Election under Article 3163 on the same official Primary Election day and across the street from the Democratic Party voting place, and limited its ballot to county and precinct offices.

Thus there were two separate official Primary Elections with no duplication of offices nor candidates, and in only one of which were negroes permitted to vote, with the result that they were denied a ballot on which to vote for local officers at the Official Statutory Primary Election, and were thus deprived of participation in the First step of the "Two-Step" Statutory Election machinery.

The Jaybird Primary is held two months before the first of the two steps in Fort Bend County; a complete ballot (with additional write-in privileges under the Texas law) is used in the Statutory Primary and General Elections in Fort Bend County, and no one is denied the Official Election ballot.

As held in this cause by the Court of Appeals, the Jaybird Democratic Association is entirely separate and apart from Article 3163 and

> " * * * does not in any way or manner operate as a part or parcel of, or in liaison with, State political or elective machinery. In short, it is not a part of the two-step arrangement, the Democratic Primary and the General Election, so as to make its action State action." (R. 111)

The Jaybird Association has violated no statute, nor been guilty of illegal conduct, as urged by petitioners.

It simply has never accepted the benefits of, nor so acted as to be subject to, any election statute. It has done no act nor performed any function in connection with the State Election machinery.

5.

(Controverting Petitioner's Argument Paragraphs IV, V and VI.)

In each of the decisions with reference to the exclusion of Negroes from voting, and as stated in SMITH v. ALLWRIGHT, 321 U.S. 629, 88 Law. Ed. 701, 151 A.L.R. 1110,

> "The question as to *whether the exclusionary action* of the party *was the action of the state persists as the determinative factor.*"

and as stated by the Court of Appeals herein:

> "What and all that is for decision here is *whether the complained of action is action under color of state law*, depriving plaintiffs of rights accorded them by the invoked constitutional and statutory provisions." (R. 113)

For the convenience of Court, we quote pertinent verbiage from the 14th and 15th Amendments to the UNITED STATES CONSTITUTION:

"* * * *No State shall make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* * * * *deny* to any person within its jurisdiction the equal protection of the laws." (14th Amendment)

"The right of citizens of the United States to vote *shall not be denied or abridged* by the United States or *by any State* on account of race, color or previous condition of servitude." (15th Amendment)

and from the Elective Franchise Statute, 8 U.S.C.A., Sec. 31, on which Petitioners largely rely:

"All citizens of the United States who are otherwise qualified by law to vote *at any election by the people* in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; *any constitution, law, custom, usage, or regulation of any State* or Territory, or by or under its authority, to the contrary notwithstanding."

As quoted by the Court of Appeals (R. 113-114) from COLLINS v. HARDYMAN, 341 U.S. 651,

"Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the *principle* has become firmly embedded in our constitutional law that the (fol. 160) *action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The case most closely analogous to the present Jaybird Association case is DRAKE v. EXECUTIVE COMMITTEE OF DEMOCRATIC PARTY FOR CITY OF HOUSTON (Dist. Ct. So. Dist. of Texas, Houston Div.), 2 Fed. Sup. 486 (January 1933), wherein the right of a Negro to vote in a City of Houston Democratic Party Primary was involved, and where it was held:

> "* * * *in the absence of a controlling statute* of the state, *a political party in Texas*, acting through its convention, committee, or otherwise under party rules and regulations, *has inherent power* to prescribe the qualifications of its members. * * * and that the *action of defendant*, city executive committee *(acting not under powers derived from the state, and not as an agency of the state*, but presumably in accordance with rules and regulations of the Democratic Party), in so denying plaintiff the right to vote in such primary election, *does not violate Plaintiff's rights* under the Fourteenth Amendment."

Each decision which on casual reading may seem adverse to Respondents has involved:

(1) The right of the Negro to vote in Official Statute-prescribed Primary Elections of the Democratic Party, such as NIXON v. HERNDON, NIXON v. CONDON, and SMITH v. ALLWRIGHT (infra); or

(2) The deprivation of the right of the Negro to vote in a Democratic Party primary where the primary election statutes have been repealed for the express purpose of eliminating the primary (but where the same two-step election procedure in fact continued) after the decision of the United States Supreme Court in SMITH v. ALLWRIGHT, such as the RICE v. ELMORE and BROWN v. BASKIN opinions by the Fourth Circuit (infra); or

(3) An instance where the Negro was permitted to vote in the Official Statute-prescribed Primary Election, but whose vote was thrown out and not counted by the election officials who under the Louisiana statute were agents of the state, as in the criminal case, UNITED STATES v. CLASSIC (infra); or

(4) A Local Party Statutory Primary election which actually constituted a part of the complete Official Primary election, as in PERRY v. CYPHERS (supra).

A clearer concept of the fundamental principles there and here involved and the inapplicability of the authorities relied upon by petitioners can best be demonstrated by a chronological review of earlier decisions, even at the risk of unduly lengthening this brief.

NIXON v. HERNDON, 273 U.S. 536, 71 Law Ed. 759 (1926), involved a 1923 Texas Statute providing that

> " * * * in no event shall a negro be eligible to participate in a Democratic Party Primary Election held in the State of Texas * * * ".

This Honorable Court held that the State of Texas itself thereby discriminated against the negro.

NIXON v. CONDON, 286 U.S. 73, 76 Law Ed. 948 (1931), arose after the 1927 repeal of the 1923 Texas Statute and the passage of a new act providing:

> "Every political party in this state through its state executive committee shall have the power to prescribe the qualifications of its own members, and shall in its own way, determine who shall be qualified to vote or otherwise participate in such political party * * * ". (Art. 3107, Appendix p. 45).

The Democratic Party is by statute required to hold a Primary and the State Democratic Executive Committee, accepting the statutory grant of power, adopted a resolution " * * * that all white Democrats * * * and none others, be allowed to participate in the Primary Elections * * * ".

This Honorable Court pointed out that the Executive Committee has no powers inherent in its being, that the State Convention (which chooses the Committee) has never declared a will to bar negroes from admission to the party, and that

> "Whatever power of exclusion has been exercised by the numbers of the Committee has come to them, therefore, not as the delegates of society, but as the delegates of the State."

The Court then points out that such Executive Committee resolution would continue binding on Election Judges although the party in convention may have sought to override it, and that

> "Power so entrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise".
>
> * * *
>
> "The pith of the matter is simply this, that when those agencies are invested with an authority *independent of the will of the association* in whose name they undertake to speak, *they become to that extent the organs of the State itself*, the repositories of official power. *They are then the Governmental instruments* whereby parties are organized and regulated to the end that government itself may be established or continued. * * *
>
> "*Delegates of the State's power* have discharged their official functions in such a way as to discriminate invidiously between white citizens and black".

Thus the action of the State through its agent the Executive Committee was condemned.

In 1932 (on the authority of Article 3107 quoted in the Appendix hereto) the Convention of the Democratic Party in Texas passed a resolution:

> "Be it resolved that all white citizens of the state, who are qualified to vote under the Constitution and Laws of Texas shall be eligible for membership in the party and subject for participation in the primary."

and the State Executive Committee and the County Executive Committee each declared the resolution valid to deprive Negroes a vote in the Statutory election.

WHITE v. COUNTY DEMOCRATIC EXECUTIVE COMMITTEE OF HARRIS COUNTY, Dist. Ct. So. Dist. of Texas, Houston Div., 60 Fed. 2d 973 (1932), involved said 1932 resolutions, which were based on Article 3107 of the TEXAS STATUTES (quoted in Appendix hereto), and the Court there held that "*The convention itself is a creation of a statute* * * * " and pointed out that

> "For a period of more than twenty-five years, the Democratic Party in Texas has, from time to time, *accepted grants of power from the state, surrendered its own inherent powers,* * * * "

and that

> " * * * the Democratic Party in Texas *has*, over a period of twenty-five years, *chosen to be known as a child and agency of the State of Texas, abandoning its own inherent powers, and choosing to conduct its affairs under grants of power from the state.*"

The WHITE case was in effect reversed by the GROVEY case next mentioned and is incorporated here only to illustrate the position of the Democratic Party as diametrically opposite from that of the Jaybird Association.

A political party itself and the convention thereof was affirmatively recognized as having inherent powers (as distinguished from State delegation and agency powers) in the next case reaching the Supreme Court.

GROVEY v. TOWNSEND, 295 U.S. 45, 79 Law Ed. 1292 (1935), the next decision by the Supreme Court, involved the same 1932 Convention and Executive Committee resolutions as in the WHITE case.

Differentiating the NIXON case (supra) and the dictates of the State of Texas, through the Democratic Executive Committee as its agent, from the resolution of the Party Convention itself which "upon its face is not state action", the Supreme Court, by unanimous opinion in 1934, held:

> "The Supreme Court of the state has decided, in a case definitely involving the point, that the Legislature of Texas has not essayed to interfere, and indeed may not interefere, with the *constitutional liberty of citizens to organize a party and to determine the qualifications of its members* * * *,
>
> * * *
>
> "We are not prepared to hold that in Texas the *state convention* of a party has become a mere instrumentality or agency for expressing the voice or will of the state * * *,
>
> * * *
>
> "We find no ground for holding that the respondent has in obedience to the mandate of the law of Texas discriminated against the petitioner or denied him any right guaranteed by the Fourteenth and Fifteenth Amendments."

UNITED STATES v. CLASSIC, 313 U.S. 299, 85 Law Ed. 1368, decided in 1940 with Justices Douglas, Black and Murphy dissenting, was a criminal case involving willful alteration and false counting of ballots cast in the Louisiana Democratic Party Primary for the nomination of candidates for Congress. The Commissioners of Election were selected in accordance with the Louisiana law, which also *requires* political parties to nominate their candidates by direct *primary elections* which are *conducted by the State* at public expense under numerous statutory regulations, and the results of which are certified to the Secretary of State who is *prohibited from placing on the official ballot the name of any person not nominated in accordance with the Act.* Further, under the Louisiana law,

> "The *right to vote for a representative in congress at the general election is, as a matter of law, thus restricted* to the successful party candidate at the primary, to those not candidates in the primary who filed nomination papers, and those whose names may be lawfully written into the ballots by the electors.",

and that the name of an unsuccessful candidate at the primary election may not be written into the ballot or counted at the general election.

A demurrer was sustained to the indictment, but the Supreme Court reversed the lower court.

Here the election officials were *direct agents of the state acting "under color of law"* in a State conducted *mandatory* primary; the votes had been cast and were thereafter by the State, through its agents, altered and falsely counted and certified.

No such criminal action was involved in the present case.

The Jaybird Association balloting is not a *required* primary, is not conducted by the State at public expense through its own agents, the results are not certified to any official, does not constitute a step in the Two-Step election machine and has utterly no determination or control over the matter of candidates applying for position on the subsequent Official Primary Election ballot.

The split decision in the CLASSIC case has no bearing in the present cause.

SMITH v. ALLWRIGHT, 321 U.S. 649, 88 Law. Ed. 701, 151 A.L.R., 1110, was decided in 1944 and involved denial of a ballot to a negro in the Statutory Democratic Party Primary based on the 1932 resolution above quoted.

Again it was pointed out with reference to statutory provisions for Primary elections:

> "Under these chapters, the Democratic Party was *required* to hold a primary which was the occasion of the alleged wrong to the petitioner."

and that the holding in the HERNDON case (supra) was

> "* * * that *the action of Texas* in denying the ballot to negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment * * *",

and that in the CONDON case (supra)

> "* * * the test was said to be whether the *committee operated as representative of the state* in the discharge of the state's authority."

Referring to its holding in GROVEY v. TOWNSEND, supra, this honorable Court stated that

> "* * * the *managers of the primary election were*, therefore, *declared not to be state officials in such sense that their action was state action.* A state convention of a party was said not to be an organ of the state. This Court went on to announce that *to deny a vote in a primary election was a mere refusal of party membership* in which the Court need have no concern * * * while for a *state* to deny a vote in an election on the ground of race or color, violated the Constitution."

The distinction between the GROVEY case and the CLASSIC case was further shown by pointing out that Section 4 of Article 1 of the CONSTITUTION authorized the Congress to regulate primary as well as general elections,

> "* * * Where the primary is by law made an integral part of the election machinery * * *";

that corruption was involved in the CLASSIC case and that:

> "This decision depended too on the determination that under the Louisiana Statute the primary was part of the procedure for choice of *Federal officials*",

and further,

> "* * * because the recognition of the place of the primary in the electoral scheme makes clear that *state delegation to a party* of the power to fix qualifications of primary election *is delegation of a state function* that makes the party's action the action of the state."

Again further holding that

> "*The question as to whether the exclusionary action of the party was the action of the state persists as the determinative factor*"

the Supreme Court, in the SMITH case involving a primary election for Federal as well as State Officers, held under mandatory provisions of the TEXAS STATUTE, decided and held

> "* * * *Texas requires* by the law the election of the county officers of a party * * * *Texas thus directs the election of all party officers*".
>
> "We think that this statutory system for the selection of party nominees for inclusion *on the general election ballot makes the party which is required* to follow these legislative directions an agency of the State insofar as it determines the participants in a primary election. The party takes its character as a *state agency* from the duties imposed upon it by State statutes * * *.
>
> "If the state *requires* a certain electoral procedure * * *, it endorses, adopts and enforces the discrimination against negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. *This is state action* within the meaning of the Fifteenth Amendment. * * *
>
> "The privilege of membership in a party may be, as the Court said in Grovey v. Townsend * * * no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary *to select nominees for a general election*, the state makes the action of the party the action of the state * * *."

The Jaybird Democratic Association is not *required* to hold a Primary Election, has never held any election to select nominees for a General Election, has never assumed or exercised any function constituting a part of the State Election machinery and none of the bases of the decision in SMITH V. ALLWRIGHT (supra) are applicable to it or to its straw votes.

RICE v. ELMORE (C.C.A. 4th), 165 F. 2d 387, cert. den., 333 U.S. 875, 92 L. Ed. 1151, and BROWN v. BASKIN (C.C.A.) 4th, 174 F. 2d 391, resulted from deliberate efforts to evade the SMITH v. ALLWRIGHT decision.

After SMITH v. ALLWRIGHT a special session of the Legislature of South Carolina was called for the *express purpose* of repealing the Primary Election laws so that the only election in the state would be the General Election.

The Primary was nevertheless in effect and in fact held, but the Negroes were denied the right to vote thereat on the theory that such Primary was not held under any statute and therefore the requisite item of State agency was not present.

This patent attempt to evade the SMITH v. ALLWRIGHT decision was struck down in RICE v. ELMORE (supra) because:

> "The use of the Democratic Primary in connection with the General Election in South Carolina provides, as has been stated, *a two step election machinery for that state;* and the denial to the Negro of the right to participate in the Primary denies to him all effective voice in the government of his country;"

and, referring to the Democratic Party,

> "The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect State institutions, governmental agencies through which sovereign power is exercised by the people. * * *
>
> "Elections in South Carolina remain a two-step process, whether the party Primary be accounted a preliminary of the General Election, or the General Election be regarded as giving effect to what is done in the

Primary; and those who *control the Democratic Party as well as the State government* cannot by placing the first of these steps under officials of the party rather than of the State, absolve such officials from the limitations which the Federal Constitution imposes. *When these officials* participate in what is a part of the State's election machinery *they are election officials of the State de facto if not de jure,* and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise."

After RICE v. ELMORE (supra), "Democratic Clubs" took over the election machinery in South Carolina in a further effort to evade SMITH v. ALLWRIGHT (supra), but in BROWN v. BASKIN (supra) this further subterfuge was stricken down on the principle that the State had allowed the organization * * * "to take over and operate a vital part of its electoral machinery".

In South Carolina the Democratic Party had for many years controlled the State and its election machinery and had operated it as an agency of the State performing State functions in the Two-Step election process. The purposeful attempt to eliminate the first step was merely a surface change and the Two-Step electoral process remained, with the same organization in charge of both steps and the State itself.

PERRY v. CYPHERS (supra) has been discussed above and bears no similarity whatever to the present case. The Citizens Party there involved followed strictly the provisions of Article 3163, affirmatively made itself the agency of the State so far as concerned County and Precinct offices, and its Official Primary Election ballot was the only ballot on which appeared the names of candidates for County and Precinct offices to be voted upon as nominees for the Gen-

eral Election; the Democratic Party not including candidates for such local offices on its Primary ballot and not seeking to nominate such for the General Election.

There is no such arrangement between the Jaybird Association and the Democratic Party in Fort Bend County, Texas. The Democratic Party holds the Primary Election and is in no way concerned with the Jaybird Association, all of whose activities have ceased some two months earlier.

6-7.

(Controverting Petitioner's Argument Paragraph IV.)

The Constitutional and Statutory provisionss and the authorities cited above clearly demonstrate that the right to vote is in an election for public officers, which is conducted by the State or its delegated and controlled agencies exercising State functions. No right is granted nor guaranteed unto a person merely because he is white or black. No forced membership in any organization is guaranteed, nor is the right to participate in the activities of an organization other than those political parties which have accepted the office and responsibility of performing for the State functions which the State itself is obliged to perform.

Well in advance of every Official Primary Election, civic clubs, churches, teachers' associations, labor unions and innumerable other organizations of every type consider the qualifications of persons who contemplate running for office, or who might be persuaded to run if they are able to secure endorsement of their candidacy. Potential candidates for whom preference is expressed (for example in a poll by the C.I.O. of its numerous members) must then decide whether to become a candidate and must thereupon comply with the conditions prescribed by law to have their names placed on the Statutory Primary Election ballot, as must all other persons desiring to run.

It is undisputed that there is no compulsion for a Jaybird Association endorsee to apply for a position on the Official Democratic Primary Election ballot, but he must himself do so if it is to be done. It is also undisputed that persons refused the endorsement of the Association and even rejected from its straw vote ballot may and do secure places on the Democratic Party Primary ballot.

It is likewise undisputed that Jaybird Association members vote their own personal convictions at the Official Primary Election, and in fact have there nominated and subsequently elected persons rejected from the Jaybird Association ballot.

The Jaybird Democratic Association is no more than a group of people or private organizations which neither seeks nor accepts any grant of power or privilege from the State, neither intends nor attempts to come under or comply with, nor secure benefits and protection of, any statute or statutory procedure, but chooses its own membership and independently and without let or hinderance from the State secures from its membership an expression of opinion as to who would make honest and faithful County officials, and of a preference between qualified persons who independently and of their own volition might or might not thereafter comply with the legal requirements and secure a position on the Official ballot for a subsequent Statutory Democratic Party Primary Election by the people, and there compete for nomination with any and all other persons who might similarly obtain positions on the ballot.

The Jaybird Association, as can churches, labor unions and other organizations, can select those from whom it desires expressions of opinion on potential candidates; and, contrary to being required to permit such expressions from one and all, is itself protected by the First Amendment to the CONSTITUTION guaranteed Freedom of Assembly and Freedom of Speech.

Conclusion and Prayer

It is respectfully submitted that the Honorable Court of Appeals correctly analyzed the real facts in this cause, properly differentiated same from the authorities relied upon by Petitioners, and reached the conclusion compelled herein by accurate application of the true controlling basic principles.

WHEREFORE, Respondents respectfully pray that this Honorable Supreme Court of the United States in all things affirm the decision of the Honorable Court of Appeals.

Respectfully submitted,

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APPENDIX

Texas Revised Civil Statutes

"1. By Parties of One Hundred Thousand Votes and Over

"Article 3100. 3085 'Primary election'

"The term '*primary election*', as used in this chapter, means an election held by the members of an organized political party *for the purpose of nominating the candidates of such party to be voted for at a general or special election*, or to nominate the county executive officers of a party. Id."

"Article 3101. 3084 Nominated at primary

"On primary election day in 1946, and every two years thereafter, candidates for Governor and for all other State offices to be chosen by vote of the entire State, and candidates for Congress and all district offices to be chosen by the vote of any district comprising more than one county, to be nominated by each organized political party that cast two hundred thousand (200,000) votes or more at the last general election, shall, together with all candidates for offices to be filled by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party. As amended Acts 1945, 49th Leg., p. 248, ch. 182, Sec. 2."

"Art. 3102. 3086 Date of primary

"The fourth Saturday in July 1926, and every two years thereafter shall be general primary election day, and *primary elections to nominate candidates for a general election*

shall be held on no other day, except when specially authorized. No person shall be declared the nominee of any political party at any primary election for any State or district office unless he has complied with every requirement of all laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections for all candidates for such office. If at the general primary election for *any political party,* no candidate becomes the nominee for any State or district office under this article, a *second primary election* shall be held by such political party, in the State or such district or districts as the case may be, on the fourth Saturday in August succeeding such general primary election, and only the name of the two candidates who received the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot as candidates for such office at such second primary. The second primary election shall be conducted according to the law prescribed for conducting the general primary election, and the candidates receiving a majority of all votes cast for the office to which they aspire shall be declared the nominee for their respective offices. *Any political party may hold a second primary election on the fourth Saturday in August to nominate candidates for any county or precinct office,* where a majority vote is required to make nomination; but at such second primary, only the two candidates who received the highest number of votes at the general primary for the same office shall have their names placed upon the official ballot. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations. All precincts in the same county and all counties in the same district shall vote on the same day. Nomina-

tions of party candidates for office to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them. Id. Acts 4th C.S. 1918, p. 191."

"*Art. 3107. Political party may prescribe qualifications of members*

"Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party. Reenacted Acts 1927, 40th Leg., 1st C.S., p. 193, ch. 7, Sec. 1."

"*Art. 3113. 3101 Candidate for county office*

"*Any person desiring his name to appear on the official ballot for the general primary,* as a candidate for the nomination for any office to be filled by the qualified voters of a *county or a portion thereof* or for county chairman, shall file with the county chairman of the county of his residence, not later than Saturday before the third Monday in June preceding such primary, a written request for his name to be printed on such official ballot as a candidate for the nomination or position named therein, giving his occupation and post-office address, giving street and number of his resi-

dence, if within a city or town, such request to be signed and acknowledged by him before some officer authorized to take acknowledgment to deeds. Such request similarly signed and acknowledged by any twenty-five qualified voters resident in the county may be filed on or before said date, requesting that the name of any person named therein may be placed on the official ballot as a candidate for any county or precinct office or chairmanship, with like effect as if such request was filed by the person named as a candidate therein; which request shall be endorsed by the candidate named therein, showing his consent to such candidacy, if nominated. Id. Sec. 111."

"2. By Parties of 10,000 And Less Than 200,000 Votes

"Art. 3154. 3159 May nominate

"Each political party, whose nominee for Governor in the last preceding general election received as many as ten thousand (10,000) votes and less than two hundred thousand (200,000) votes, may nominate candidates for State, district and county offices under the provisions of this law by primary election, and they may nominate candidates for State offices and for United States Senator at a State convention, which shall be held the second Tuesday in August, and which shall be composed of delegates selected in the various counties and county conventions held on the first Saturday after primary election day, which shall be composed of delegates from the general election precincts in such counties elected therein at primary conventions, held in such precincts on the fourth Saturday in July. As amended Acts 1945, 49th Leg., p. 248, ch. 182, Sec. 3."

"3. NON-PARTISAN AND INDEPENDENT CANDIDATES

"*Art. 3159. 3164 Non-partisan and independent candidates*

"The name of a non-partisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the Secretary of State and delivered to him within thirty days after primary election day as follows: If for a State office to be voted for throughout the State, one per cent of the entire vote of the State cast at the last preceding general election; if for a congressional, supreme judicial, senatorial, representative, flotorial or judicial district office, three per cent of the entire vote cast in any such district at the last preceding general election; provided, that the number of signatures need not exceed five hundred for any congressional, senatorial or judicial office, nor for any other office that is not filled by all the voters of the State. No application to the Secretary of State shall contain the name of more than one candidate, and no citizen shall sign such application, unless he has paid his poll tax or received his certificate of exemption; provided, that, if the office is one to which two or more persons are to be elected, his application may be for as many candidates as there are persons to be elected to that office; and provided, also that no person who has voted at a primary election shall sign an application in favor of any one for an office for which a nomination was made at such primary election. Id. Secs. 94-95."

"4. BY PARTIES WITHOUT STATE ORGANIZATIONS

"*Art. 3163. 3169 Parties without State organization*

"*Any political party without a State organization desiring*

to nominate candidates for county and precinct offices only *may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day,* which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a.m. and ten p.m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election. Id. Sec. 100."

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 52

JOHN TERRY, ET AL., *Petitioners*,

v.

A. J. ADAMS, ET AL., *Respondents*

PETITION FOR REHEARING

E. E. TOWNES,
C. I. McFARLANE,
EDGAR E. TOWNES, JR.,
Counsel for Respondents,
A. J. ADAMS, ET AL.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Come now A. J. Adams, et al., Respondents in the above entitled cause and present this, their petition for a rehearing of the said cause, and, in support thereof, respectfully show:

I.

Respondents present this petition for rehearing herein due to the extreme importance of the questions involved because:

(1) For the first time this Court has held that the State has no right or authority to determine and establish its own electoral machinery, where such machinery makes no discrimination whatever for or against any individual or group. The State of Texas has provided the exclusive and mandatory method and procedure whereby persons may be nominated for public office. This Court, regardless of the absence of discrimination in the State required processes, has stricken down the exclusive methods and procedures and has assumed jurisdiction to dictate and provide for other and different machinery.

(2) This Court has assumed jurisdiction beyond the provisions of the Fourteenth and Fifteenth Amendments to the Constitution and of the Elective Franchise Statute in that it has assumed to govern the actions of an organization which forms no part of the official State electoral machinery, and which the State admittedly does not control; and while for the moment the Court holds that the Fifteenth Amendment "excludes social or business clubs" and that "not every private club, association or league organized to influence public candidacies or public action must conform to the Constitution's restrictions on political parties"; nevertheless, if the present opinions and decisions stand, all elections public or private, in the last analysis will be subject to periodic opinions of the Supreme Court as to whether the action of a majority or a minority group, club or organization is actually the State action, regardless of State statutes containing strict requirements.

(3) The effect of the Court's opinion is to force upon the States, by presumptions, agents which it does not want and hold the State responsible for any and every act of such individual agent, whether within or without official capacity, and even though such acts be unrecognized and prohibited by State law.

II.

Grounds for Rehearing

1. This Court has grievously erred in failing and refusing to recognize (1) that the Fifteenth Amendment, quoted in the opinions, provides that the right to vote "shall not be denied or abridged by the United States or *by any State* * * *"; and (2) that the Elective Franchise Statute: 8 U.S.C.A., Sec. 31, is with reference to voting at an *election by the people*, "any Constitution, law, custom, usage, or regulation of any State * * * or by or under *its authority*, to the contrary notwithstanding;" and, therefore, (3) that State action only—and not acts by individuals or groups—is the subject matter thereof.

2. The predominant issue before the Court in this case is whether or not the alleged discriminations result from State action. In this cause, the Court, through its decision, has extended its construction of the Fourteenth and Fifteenth Amendments to the United States Constitution to include unofficial action by private individuals in alleged infringement of civil rights; whereas, heretofore, this Court, in accordance with the express directions of said Amendments, has properly limited its jurisdiction over such discrimination and infringement to instances based solely upon State action, as distinguished from individual action.

3. In the opinions delivered respectively in this cause by Justices Black, Clark and Frankfurter, the Court has mistakenly and erroneously found, or improvidently adopted the findings of the District Court, that the Jaybird Association is a political party; that the Jaybird primary has become an integral part of the elective process that determines who shall rule and govern in Fort Bend County. The verity of such findings are challenged as unsupported by and contradictory to the stipulated facts, portions of which stipulation are as follows:

"There is no political organization in Fort Bend County, Texas, by the official name or designation "Jaybird Party". At all times since 1889, however, there has been and still is an organization in Fort Bend County, Texas, by the name of "Jaybird Democratic Association of Fort Bend County, Texas". Said Association, however, has not (fol. 35) since 1938, and it does not: (a) Have a State organization; (b) Follow or attempt to comply with any of the provisions of Article 3163 of the Revised Statutes of Texas, or of any other statutes of the State of Texas with reference to primary elections or general elections; (c) Hold any convention or "primary election" on the legal primary election day, to-wit: The fourth Saturday in July or the fourth Saturday in August, of any year; (d) Hold any primary convention in any precinct on the Saturday preceding a legal primary election day; (e) By the chairman of a county committee, or otherwise, certify to the County Clerk of Fort Bend County, Texas, or to the County Judge thereof, or to any official committee or other representative of the Democratic or Republican Party, any nominations or indorsements made by the Association; (f) Have, or cause to be, printed in a separate column headed by the Association name any nominations on any official ballot used, or for use in, a primary or general election held on a legal primary election day or general election day; (nor does the name, Jaybird Democratic Association of Fort Bend County, Texas, or any part or indication thereof, appear on any ballot in any election other than the primaries, or other special voting occasions, held by the Association itself and alone); (g) Make, or cause to be made, a written application to the County Judge for such printing, signed and sworn to by 3% of the entire vote cast in Fort Bend County at the last preceding general election." (R. 24-25)

* * *

"The Ballots from each of the Association voting precincts are canvassed by the Executive Committee

to determine which person seeking the indorsement of the Association for each position has received the greatest number of votes. The Executive Committee of the Association declare the results of such canvass of the returns and announce the identity of the respective persons who have so received the greatest number of votes at the May Jaybird Democratic Association of Fort Bend County, Texas, for the respective positions.

"No officer nor Committee of such Association certifies the result of the Association membership vote, nor any nominations of the Association, to the County Clerk of Fort Bend County, Texas, nor to the Democratic Party Executive Committee nor to the Committee or official of any party with a state-wide organization.

"XII.

"There is no compulsion upon any person who receives the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, for a particular office, to run for that office or any other office. In the event such indorsee of the Association does desire to run for such office he may do so; but if he does so run for such office he must himself file his application with the Executive Chairman or Committee of the Democratic Party for the position on the Democratic Party ballot for the July primary of such Democratic Party, and must himself pay the fee as provided by law. Neither the Jaybird Democratic Association nor its Executive Committee files an application with the Democratic Party Executive Committee or Chairman that the Jaybird Democratic Association nominee be placed on the ballot for the Democratic Party July primary election. There is nothing on the ballot of the Democratic Party primary to indicate that any person appearing thereon does or does not have the indorsement of the Jaybird Democratic Association.

"The name of the applicant for a place on the Democratic Party ballot is not placed on said ballot unless

he complies with the laws of the State of Texas, even though such applicant were indorsed by the Jaybird Democratic Association; and every qualified applicant who makes the required application to the Democratic Executive Committee and pays the requisite fee is placed on the Democratic Party primary ballot for the July Democratic primary though not indorsed by the Jaybird Democratic Association. (R. 28-29) * * *

"In the last few years some of the members of the Negro race have offered to vote in the Democratic Party Primaries and no member of the Negro race who had qualified under the laws of the State of Texas to vote has been refused the right to vote. Some of the members of the Negro race have offered to vote in a general election in Fort Bend County, Texas, and no member of the Negro race qualified to vote has been refused a vote." (R. 29) * * *

"XIV.

"The Jaybird Democratic Association of Fort Bend County, Texas, is not, and does not have, a state organization, but limits its May and June Association primaries to only the county and precinct offices, except that the membership of the Association does vote its preference for the office of District Clerk in Fort Bend County.

"The persons seeking the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, at its May or June Primaries are not required by the Association to file any expense account and do not file expense accounts with any State or local official, Committee or Board." (R. 30) * * *

4. The decision of the Court made in this case inescapably involves the repeal of the election laws of the State of Texas which provide the exclusive method whereby citizens may organize and become a political party, and, as such, participate in primary elections legally authorized under the laws

of this State. The real issue before the Court is: Does this Court recognize that the State alone has the right to enact laws providing for primary and general elections to be held in this State applying to all citizens alike without discrimination? No outspoken attack upon the Texas statute has yet been made in this case.

5. The Court has relied upon the cases of SMITH V. ALLWRIGHT; RICE V. ELMORE; and BASKIN V. BROWN, in support of their conclusion in this case. The basis of the decisions made in each of these three cases was that the discrimination was exercised by the State, which is not present here.

6. The decision is erroneous in that careful reading of each opinion shows that the element of State action was assumed, as clearly stated in the opinion of Justice Frankfurter, and as clearly apparent from the opinions of Justices Black and Clark, one presumption being built upon another contrary to actual facts affirmatively stipulated, and contrary to time-worn established legal principles. Some of these presumptions are: (1) That State election officials participated in the Jaybird activities and primaries. There is nothing in the record to support this presumption. (2) That such presumed participation was in the capacity of a State official; which likewise is wholly unsupported by the record. (3) That Presumptions (1) and (2) would support a further presumption that the State participated in the activities of the Jaybird Association as complained of, which third presumption is likewise wholly unsupported by the record and in violation of affirmative facts. This is the sole basis of the Court's claim that the action complained of is State action.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a Rehearing be granted and that upon further consideration the judgment and opin-

ions of this Court be set aside and withdrawn and that judgment be entered herein affirming the judgment of the Court of Appeals.

Respectfully submitted,

E. E. TOWNES,

C. I. McFARLANE,

EDGAR E. TOWNES, JR.,
Counsel for Respondents,
A. J. ADAMS, ET AL.

I, the undersigned, one of the counsel for the above named respondents, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Counsel for Respondents,
A. J. ADAMS, ET AL.